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In The

Supreme Court of the United States

MARILYN MITCHELL, KEVIN BALE, AND SUSAN BOORSTEIN,

Petitioners,

v.

CONTINENTAL AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

STUART M. NELKIN*
CAROL NELKIN
JAY P. NELKIN
NELKIN & NELKIN, P. C.
5417 Chaucer
Houston, TX 77005
713-526-4500

*Counsel of Record

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether employees covered by the RLA must allege unfair representation by their union as a prerequisite to obtaining district court review of the award of a Railway Labor Act Board despite express language in the RLA authorizing any employee aggrieved by the terms of an award of the Board to file suit.

2. What constitutes "due notice" as required by § 153 First (j) of the RLA.

3. Whether employees subject to the RLA must exhaust administrative remedies in order to attack a decision of an RLA Board rendered without notice to the employees.

4. Whether employees subject to the RLA may assert independent claims under the Constitution for denial of due process when the deprivation of rights related to actions by an RLA Board.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 481 F.3d 225 (5th Cir. 2007). Appendix A. The Fifth Circuit affirmed the decision of the United States District Court for the Southern District of Texas which is reported at 2005 WL 2708192 (S. D. Tex. August 5, 2005). Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit entered its judgment on March 7, 2007. Appendix A. No petition for rehearing or rehearing *en banc* was filed. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rules 13.1 and 30 of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

45 U.S.C. § 153 provides:

§ 153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided –

* * *

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board

shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

The United States Constitution, Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioners are flight attendants employed by Continental Airlines, Inc. in a bargaining unit represented by the International Association of Machinists and Aerospace Workers. Petitioners filed suit in the Southern District of Florida seeking to vacate two related decisions of an RLA Board rendered May 17, 2002.

On August 5, 2005, following transfer to the Southern District of Texas, the district court entered judgment for Continental and the IAM. Although Petitioners properly brought their claims under the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* and the fifth amendment, the district court, relying solely on cases interpreting the provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* and the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.,* found that Petitioners lacked standing to sue due to their failure to allege a breach of the duty of fair representation against the IAM. Appendix B, App. 38-39.

Petitioners asserted before the Fifth Circuit, and they assert here that the Railway Labor Act, which is applicable to the airline industry,[1] differs from the NLRA and the LMRA in that the RLA specifically authorizes any

[1] In 1936, Congress extended the RLA to cover the air transportation industry. 45 U.S.C. §§ 157-159.

employee aggrieved by the decision of an RLA Board to seek review in federal district court. 45 U.S.C. § 153 First (q). Despite the express language of the RLA granting employees such as Petitioners the right to prosecute a suit in federal court to vacate an RLA Board decision, the Fifth Circuit held:

> Today, we logically extend our holdings in *McNair* and *Acuff* to RLA cases, concluding that when a CBA that is formed pursuant to the RLA establishes a mandatory, binding grievance procedure and gives the union the exclusive right to pursue claims on behalf of aggrieved employees, one whose employment is governed by the CBA lacks standing to attack the results of the grievance process in court, except only that an employee has standing to bring a claim of unfair representation.

Appendix A, App. 16.

The proceedings before the Board whose decision Petitioners sought to have vacated, were based upon the grievances of six flight attendants, including Mitchell and Bale. These grievances complained of Continental's retroactively and arbitrarily adversely adjusting the particular grievant's non-competitive seniority dates.[2] The individual grievants also contended that Continental had control over calculating the flight attendants' non-competitive seniority dates, but failed to properly monitor or correctly calculate these dates. The Board found:

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[2] Continental's flight attendants accrue different types of seniority: pay, vacation, jump seat and pass riding, bidding and company service seniority. Bidding seniority was not adjusted and is not at issue. The seniority involved in this case is "non-competitive seniority." No posting or regular communication regarding non-competitive seniority has ever been afforded Continental's flight attendants.

> [A] careful record of when an individual returned to work from a leave of absence for purposes of his or her seniority was not always maintained. Adjustment was made for periods of inactivity taken by some individuals when they returned to work, but not for others.

Appendix C, App. 53. The Board also found that in many instances, flight attendants who raised questions about their seniority dates then had their seniority adversely adjusted. Appendix C, App. 50-51.

A. Petitioner Mitchell: Mitchell began flying for Continental on February 25, 1969. For 27 years, that date was used as Mitchell's pass riding seniority date. In 1996, Continental changed Mitchell's pass riding seniority date without her knowledge. When Mitchell asked why less senior flight attendants were boarding a flight before her, she learned that her jump seat and pass riding seniority had been retroactively adjusted for a company-offered leave that she had taken years earlier.[3] Several other retroactive adjustments of her seniority occurred without Mitchell's knowledge.

After many attempts, Mitchell was permitted by the IAM to file a grievance complaining about the unjustified, inaccurate retroactive adjustments of her seniority. Mitchell's grievance was denied at both the step one and step two levels by Continental. During the pendency of the

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[3] Since 1969, company-offered leaves have been offered to Continental's flight attendants in seniority order to alleviate the impact of overstaffing and base closings. Company-offered leaves benefit Continental by encouraging senior higher paid flight attendants to take unpaid leave resulting in fewer junior flight attendants being furloughed. In this manner, Continental lowers its costs by having lower paid flight attendants on duty, and does not have to pay furlough pay to its junior flight attendants as required by the CBA. Appendix A, App. 3-4, n.2.

grievance, Continental advised Mitchell on August 8, 2000 that her seniority had once again been adversely adjusted, although she had not taken any other leaves of absence.

Mitchell attended both days of the Board hearing. During a short recess on the second day of the hearing, IAM's attorney told Mitchell for the first time that she would have to present her grievance by herself. When the hearing reconvened, Mitchell was called to present her claims. Mitchell was extremely upset and told the Board members that she was not an attorney, and did not know how to proceed. Despite the obvious lack of fairness, no member of the Board did anything to intervene. Continental's attorney was permitted to cross examine Mitchell who was left with no one to object to improper questions. Appendix F, App. 67-71; 73-74; Appendix I, App. 95-96.

B. Petitioner Bale: Bale was hired by Continental as a flight attendant on July 1, 1987. In 1991, Bale accepted a company-offered leave. Continental did not advise Bale or its other flight attendants that it would adjust the service dates of those who accepted this company-offered leave.

In 1993, Continental asked for volunteers to take company-offered leave. Bale took 5 months of company-offered leave at that time. The CBA in effect when Bale took the company-offered leave did not indicate that a flight attendant accepting a company-offered leave would have his or her seniority adjusted as a result.[4] In 1994, Bale took 2 months of company-offered leave. In 1995,

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[4] Language indicating that a flight attendant's seniority would be adjusted for taking a company-offered leave does not appear in any CBA until 1996.

Bale took his last company-offered leave which lasted 5 months.

Under the CBA, Bale should have received an additional week of vacation in July 1997 on his tenth anniversary with Continental. When he did not receive this additional week of vacation, he inquired, and was told he would obtain the ten year vacation seniority date the following year. However, when he inquired about the extra week of vacation in 1998, he was told that his vacation seniority date had been adversely adjusted again, even though he had not taken any leave since 1995. On August 15, 2000, Bale filed grievances complaining of unfair adjustment of his seniority. His grievances were denied at the step one and step two levels.

Bale was given very little notice that the Board hearing would take place. During his testimony, Bale was stunned when, without warning to him, counsel for IAM told the Board that Bale had filed grievances which the IAM did not support, and that Bale would be presenting those grievances on his own behalf. Bale was not prepared to do so either by training or by having been given any notification that it would be his responsibility to present his grievance on his own.

Although it was apparent that Bale was surprised by the actions of IAM's attorney, the Board took no action to prevent Bale's being required to present his own grievance. Appendix G, App. 77-82; Appendix I, App. 94-95.

C. Petitioner Boorstein: Boorstein began working for Continental as a flight attendant on November 11, 1968. Over the years, Boorstein had taken several company-offered leaves but was unaware that her seniority dates could be adjusted for taking such leave. Boorstein did not know that her seniority had been adjusted until less senior flight attendants were permitted to board a

flight ahead of her. When Boorstein inquired, she was told for the first time that her seniority date had been adjusted to a date in 1971.

Boorstein was not a party to the Board proceedings discussed above. However, sometime after May 17, 2002, Boorstein learned that the Board had issued a Decision and Award that affected her seniority rights and those of all other Continental flight attendants. Boorstein was not given notice of the scheduled hearing prior to the hearing, nor was she afforded any opportunity to present testimony, seek relief, or otherwise participate in the Adjustment Board proceedings.

When Boorstein read the Board's Decision, she discovered that, under its terms, a flight attendant would have the responsibility to prove, without adequate access to the information necessary, that her non-competitive seniority had been retroactively adjusted during the two year period prior to May 17, 2000. Boorstein and the other flight attendants were advised by Continental and IAM that anyone making a claim under the Board's Decision was subject to having Continental make adverse adjustments to his or her seniority dates. Boorstein knew that obtaining documents from Continental's HR Department was extremely difficult, and because she was aware that most flight attendants who attempted to obtain their records or otherwise inquired about their seniority dates were subjected to arbitrary adverse adjustments of those dates, Boorstein was too frightened to file a claim seeking to have her seniority restored. Based upon her prior experiences with Continental's HR Department, Boorstein had a well grounded belief that the only result of her attempting to comply with the Board's Decision would be that her seniority dates would again be adversely adjusted. Appendix H, App. 83-85.

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS WARRANTED TO RESOLVE CONFLICTS REGARDING WHETHER EMPLOYEES MUST ESTABLISH UNFAIR REPRESENTATION BY THEIR UNION AS A PREREQUISITE TO OBTAINING JUDICIAL REVIEW OF THE AWARD OF AN RLA BOARD DESPITE EXPRESS LANGUAGE IN THE RLA AUTHORIZING ANY EMPLOYEE AGGRIEVED BY A BOARD AWARD TO FILE SUIT.

A. The Fifth Circuit Is The First Court Of Appeals To Make Unfair Representation By A Union A Prerequisite To Judicial Review Of The Decision Of An RLA Board.

The Fifth Circuit has now held for the first time in the lengthy history of the RLA that where a CBA under the RLA creates a mandatory binding grievance procedure giving the union the exclusive right to represent employees in the grievance process, employees covered by the CBA lack standing to attack the results of the grievance process in court unless the employees bring a claim of unfair representation against the union. In reaching this opinion, the Fifth Circuit acknowledges that it has for the first time extended its holdings in *McNair v. United States Postal Service,* 768 F.2d 730 (5th Cir. 1985) and *Acuff v. United Papermakers and Paperworkers*, 404 F.2d 169 (1968), *cert. denied,* 89 S.Ct. 1466 (1969), cases applicable to the LMRA and the NLRA, to all claims brought pursuant to the RLA.

The Fifth Circuit's decision affects the rights of thousands of Continental employees as well as the rights of hundreds of thousands of employees working in industries covered by the RLA with regard to access to the federal courts. The Fifth Circuit decision adversely impacts the rights of these employees by severely restricting

the types of claims that may be brought under the RLA and by effectively changing the Congressionally mandated statute of limitations applicable to cases seeking review of the decision of RLA Boards.

For example, prior to the Fifth Circuit ruling, an employee covered by the RLA had the right to make a claim for breach of the duty of fair representation but was not required to do so. *See Landry v. Airline Pilots Association Intern. AFL-CIO,* 901 F.2d 404, 411 (5th Cir. 1990). Such a claim could be brought separately or as part of a "hybrid" action joining a claim against the employer. Both a claim for breach of the duty of fair representation and a hybrid claim have six month statutes of limitations. In contrast, a claim under the RLA for review of a Board award on the basis that the Board failed to comply with RLA requirements, that the Board exceeded its jurisdiction, or that there was fraud or corruption by a Board member has a two year statute of limitations. *Trial v. Atchison, Topeka & Santa Fe Railway Co.*, 896 F.2d 120, 125-26 (5th Cir. 1990); *Brock v. Republic Airlines, Inc.,* 776 F.2d 523, 526-27 (5th Cir. 1985); *Edwards v. Universal Parcel Service, Inc.*, 2001 WL 777414 (6th Cir. July 5, 2001). The Fifth Circuit's unwarranted rewrite of the RLA should be reviewed by this Court.

B. The Fifth Circuit Decision Is Contrary To The Plain Language Of The RLA.

The Railway Labor Act at 45 U.S.C. § 153 First (q) provides:

> If any employee, or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such

> award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order.

The RLA was amended in 1936 to bring the airline industry under its provisions. At that time, 45 U.S.C. § 153 dealing with the National Railroad Adjustment Board was not made applicable to the airline industry.

In *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 248, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994), this Court made it clear that 45 U.S.C. § 153 is applicable to the airline industry.

In *Steward v. Mann*, 351 F.3d 1338 (11th Cir. 2003), the Eleventh Circuit held that 45 U.S.C. § 153 First (j) should be applied to proceedings before an airline Board despite the early statutory language excepting § 153 from applicability to the airline industry. The Eleventh Circuit based its holding in *Steward* on prior rulings of this Court stating:

> [W]hen the Supreme Court confronted the question of whether there was a federal cause of action to enforce an award of an airline adjustment board, it looked to the entirety of the RLA, rather than just those provisions which Congress expressly applied to the airline industry. *International Association of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685-89, 83 S.Ct. 956, 958-61, 10 L.Ed.2d 67 (1963). The Court concluded that Congress intended that the awards of airline adjustment boards be enforceable by a federal cause of action, based on the RLA's purpose of quickly and finally resolving employee grievances to avoid strikes. *Id.* at 687, 690, 83 S.Ct. at 959, 961. The Court went on to suggest that courts confronted with similar questions in the future should consult other provisions of RLA

which do not expressly apply to airline adjustment boards:

> the provisions of a § 204 [codified at 45 U.S.C. § 184] contract, such as those governing the composition of the adjustment board, *the procedures to be employed as to notice and hearing* or for breaking deadlocks, or the finality to be accorded board awards, are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme. *Id.* at 694, 83 S.Ct. at 963.

Id. at 1344-45 (emphasis added).

After this Court's 1963 holding in *IAM v. Central Airlines,* Congress amended the RLA. The legislative history regarding the 1966 amendments states that:

> The principal purpose of the bill is to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board, to expedite disposition of grievances and disputes over the interpretation and application of agreements, and *to provide equal opportunity for limited judicial review of awards of the Board to employees and employers.*

S. Rep. No. 1201 (1966), 1966 U.S. Code Cong. and Adm. News, pp. 2285-86 (emphasis added).

The "limited judicial review" referred to in the legislative history is found at 45 U.S.C. § 153 First (q) and requires an employee seeking to overturn the decision of an RLA Board to demonstrate either that (a) the Board did not follow the requirements of the RLA, (b) the Board exceeded its jurisdiction, or (c) the Board acted fraudulently or corruptly. 45 U.S.C. § 153 First (q); *Hall v. Eastern Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975);

Chernak v. Southwest Airlines, Co., 778 F.2d 578, 580-81 (10th Cir. 1985); *Henry v. Delta Air Lines*, 759 F.2d 870, 872 (11th Cir. 1985); *Brotherhood of Locomotive Engineers v. St. Louis Southwestern Ry. Co.*, 757 F.2d 656, 660-61 (5th Cir. 1985); *Atchison, Topeka and Santa Fe Ry. v. United Transp. Union*, 175 F.3d 355, 357 (5th Cir. 1999); *Continental Airlines, Inc. v. International Brotherhood of Teamsters*, 391 F.3d 613, 617 (5th Cir. 2004), *cert. denied*, 126 S.Ct. 331 (2005).[5]

C. The Fifth Circuit Decision Conflicts With This Court And Other Circuits By Failing To Recognize The Differences Between The RLA And The NLRA And LMRA.

The Fifth Circuit reviewed Petitioners' claims under case law interpreting the provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* and the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* Neither *McNair v. United States Postal Service,* 768 F.2d 730 (5th Cir. 1985) nor *Acuff v. United Papermakers and Paperworkers*, 404 F.2d 169 (5th Cir. 1968), *cert. denied*, 89 S.Ct. 1466 (1969), the cases relied upon by the Fifth Circuit as the basis for its ruling involved RLA claims.

The Fifth Circuit's failure to assess Petitioners' claims under the proper standard resulted in their erroneous dismissal because the prerequisites for a party's seeking to overturn the decision of an RLA Board differ greatly from those required under the NLRA and the LMRA, *See, e.g., Communications Workers of America v. Beck*, 487 U.S. 735 (1988) (unlike the NLRA, the RLA establishes no agency charged with administering its provisions, and instead

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[5] As discussed in Section III, numerous courts have additionally held that a fourth ground for overturning a Board decision is that the Board denied the parties fundamental due process.

leaves it to the courts to determine validity of activities challenged under the Act).

Unlike the RLA, in NLRA and LMRA cases, an aggrieved worker whose employment is governed by a binding CBA normally lacks standing independently to initiate grievance procedures or to contest such procedures in court. *McNair*, 768 F.2d at 735. However, if a claimant under the NLRA or the LMRA is able to demonstrate that his union breached its duty of fair representation, he may sue both the union and his employer for breach of the agreement. *Id.*

These differences between the statutes were acknowledged by this Court in *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 99 S.Ct. 2121 (1979) wherein this Court held:

> *Vaca* involved a union certified under the National Labor Relations Act and a collective-bargaining agreement that permitted employees to initiate the grievance process, but precluded them from personally pursuing arbitration once grievance procedures were exhausted. 386 U.S. at 175 n.3, 87 S.Ct. at 909. The Railway Labor Act is somewhat more solicitous of individual rights. It authorizes employees who are unsuccessful at the grievance level to seek relief in their own right from the National Railroad Adjustment Board. §§ 3 First (i), (j), 45 U.S.C. §§ 153 First (i), (j).

Id. at 49 n.11. The RLA also allows employees who are aggrieved by the decisions of a Board to appeal to the district court. 45 U.S.C. § 153 First (q).

Because Mitchell and Bale did not pursue a claim of breach of the duty of fair representation, the Fifth Circuit held that they did not have standing to challenge the Board decision. Moreover, the Fifth Circuit expanded its

ruling on Petitioners' individual claims to all claims arising under the RLA. If permitted to stand, the Fifth Circuit's opinion has effectively rewritten the statutory scheme created by Congress as set forth in 45 U.S.C. § 153 First (q).

By failing to apply the statutory provisions of 45 U.S.C. § 153 First (q) to the claims brought by Mitchell and Bale and by failing to acknowledge the differences between the statutory framework for claims brought by aggrieved employees under the RLA, the Fifth Circuit created a conflict between its holding and the holdings of this Court and numerous Courts of Appeals which have held that employees in the airline and railroad industries may sue to vacate the decision and award of an RLA Board without having to allege a claim for unfair representation. *See, Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978); *Parsons v. Continental Airlines, Inc.*, 2007 WL 174428 (11th Cir. Jan. 24, 2007); *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183 (11th Cir.), *cert. denied*, 540 U.S. 1016 (2003); *Henry v. Delta Air Lines*, 759 F.2d 870 (11th Cir. 1985); *Allen v. CSX Transportation, Inc.*, 22 F.3d 1180 (D.C. Cir. 1994); *Colletti v. N. J. Transit Corp.*, 2992 WL 1769006 (3d Cir. July 31, 2002); *Chandler v. American Airlines, Inc.*, 1992 WL 72955 (10th Cir. April 10, 1992) (claim against union for breach of duty of fair representation is a discrete claim quite apart from right of individual employees expressly extended to them under the RLA to pursue their employer before the Board); *Stevens v. Teamsters Local 2707, Airline, Aerospace and Allied Employees*, 504 F. Supp. 332 (W.D. Wash. 1980) (airline employees covered by RLA have same statutory right individually to process grievances as railroad industry employees).[6]

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[6] The Fifth Circuit itself had previously ruled that a Board had jurisdiction to hear a flight attendant's complaints regarding termination

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Given the frequency with which disputes arise under the terms of the RLA and given the conflicts that exist among the Circuits, review of this important issue affecting thousands of workers in the United States workforce should be granted.

D. The Fifth Circuit's Acknowledgment That A Conflict Exists With The Third Circuit's Decision In *McQuestion v. N.J. Transit Rail Operations* While Attempting To Distinguish That Case Underscores The Breadth Of The Fifth Circuit's Ruling And Emphasizes The Need For Review By This Court.

Numerous courts have relied upon the express language of 45 U.S.C. § 153 First (q) to find that employees covered by the RLA may seek judicial review of a ruling of an RLA Board without alleging a claim of unfair representation. These courts, including this Court, have adhered to the sound principle of law that if Congressional intent is clear from the plain words of a statute, application of other means of construction is unnecessary and unwarranted. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445 n.29, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) (court must give effect to the unambiguously expressed intent of Congress).

The wording of 45 U.S.C. § 153 First (q) could not be clearer; yet the Fifth Circuit has gone to great length to contort the clear meaning of the statutory language and to import into the RLA extraneous concepts from other laws which clearly were not intended by Congress to be applicable to the railroad and airline industries.

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and the airline's failure to follow the terms of a CBA under 45 U.S.C. § 184, and that limited review of that decision may be heard upon the filing of a suit in district court pursuant to 45 U.S.C. § 153. *Soileau v. Southwest Airlines Co.*, 2000 WL 1273394 (5th Cir. August 23, 2000).

In discussing *McQuestion v. New Jersey Transit Rail Operations, Inc.*, 892 F.2d 352 (3d Cir. 1990), the Fifth Circuit acknowledged that the Third Circuit found that the plain language of 45 U.S.C. § 153 First (q) provides individual employees standing to bring a petition for review of an arbitral hearing initiated under the RLA. However, the Fifth Circuit then limited the clear language of the statute to employees with "uniquely individual grievances." Of course, nothing in the statute refers to "uniquely individual grievances." Moreover, the Fifth Circuit underscored its hostility to the plain language of the statute and its applicability to Petitioners' claims by announcing:

> We do not foreclose and need not decide today whether an individual employee may ever bring such "uniquely individual claims," rendering him the "real party in interest," such that § 153 First (q) provides him standing to bring an RLA claim. Rather, under the facts presented here and those of our precedent, an aggrieved employee will generally lack standing to bring an RLA action.

Appendix A, App. 15, n.24. Contrary to the rulings of this Court and to all other Circuits that have addressed the issue, the Fifth Circuit has now indicated an intent to write out of the RLA the express right of any employee to seek redress in the district court.[7]

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[7] The Fifth Circuit's attempt to distinguish *McQuestion* on the basis that *McQuestion* addressed "uniquely individual grievances" as opposed to the general grievance brought by the IAM, is belied by the fact that the initial Decision of the Board indicates it was hearing the individual grievances of Mitchell, Bale and four other individuals. Appendix C, App. 47. It is not until the second Decision of the Board that a reference to a general grievance appears. *See*, Appendix D, App. 57. Even after the inclusion of the general grievance, the Board

(Continued on following page)

In light of the extreme interpretation of the RLA by the Fifth Circuit which has created a conflict among the Circuits and in light of the importance of the issue to so many people who would benefit from this Court's clarification of the statutory provisions involved, Petitioners respectfully urge the Court to grant this Petition for Writ of Certiorari.

II. REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS REGARDING WHAT CONSTITUTES "DUE NOTICE" UNDER § 153 FIRST (j) OF THE RLA.

Petitioner Boorstein and some 9,000 other Continental flight attendants received no notice of the Board hearing at which evidence was taken, and following which, a Decision and Award was issued impacting their seniority. The RLA, however, contains the following provision:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

45 U.S.C. § 153 First (j).[8]

Contrary to the clear language of § 153 First (j), the Fifth Circuit held that Boorstein and those similarly situated were not entitled to any notice whatsoever because

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addressed the individual claims and made findings specific to the six individuals involved.

[8] The RLA's "due notice" provisions are applicable to the operations of airline adjustment boards. *Steward v. Mann*, 351 F.3d at 1344-45; *Air Line Pilots Ass'n Intern. v. Texas Intern. Airlines, Inc.*, 567 F. Supp. 66, 76-77 (S.D. Tex. 1983).

the IAM had notice, and notice to the union would be deemed sufficient notice to all those covered by the CBA. Appendix A, App. 11-12.

The standard set by the Fifth Circuit in the instant case effectively eliminates the due notice provision of the RLA since by definition, anyone whose rights are being determined by a Board is covered by the CBA. In reaching its decision, the Fifth Circuit relied upon selected language in *Brotherhood of Railroad, Airline, & Steamship Clerks, Freight Handlers, Express & Station Employees v. St. Louis Southwestern Ry. Co.*, 676 F.2d 132, 136 (5th Cir. 1982) in which the court stated:

> We are convinced, therefore that the Board is obligated to notify an employee (or his representative) of any proceeding that may result in that employee's losing his position. This requirement should not prove burdensome in most instances, since a letter of notification to one or two union representatives normally will ensure that all "involved" parties are apprised of the dispute. In any event, inconvenience cannot excuse noncompliance with the law. See *Estes*, 89 F.2d at 771. *Estes* clearly established the rule that the Board must extend notice "to all persons who will be substantially affected by the order that may be entered by the Board, unless notice is waived." *Id.*

When this earlier Fifth Circuit decision is read in its entirety rather than by focusing on phrases taken out of context, it is clear that the earlier decision required that employees receive notice prior to a hearing unless they had taken some action to waive that right. It is equally clear that the court's reference to the fact that in most instances the only action required would be to send a letter to one or two union representatives is explicitly premised upon the expectation that the union representative would insure

that "'all involved' parties are apprised of the dispute." Here Boorstein and those similarly situated were "involved" parties who were not in any way "apprised" that their rights were being adjudicated.

The Fifth Circuit's opinion regarding the due notice provisions of the RLA conflicts with the pronouncement of other Circuits. For example, the Eleventh Circuit has held that the right of due notice applies to all employees whose seniority might be affected by a Board award. *Steward v. Mann*, 351 F.3d at 1338, 1345-46. While the Circuits are not necessarily in agreement as to the extent of the notice that is required, no Circuit has found, as did the Fifth Circuit, that an employee's being covered by a CBA will be sufficient to satisfy the RLA's due notice requirement.

The range of Circuit holdings on the issue of due notice was described by the Ninth Circuit in *English v. Burlington Northern Railroad Co.*, 18 F.3d 741, 744-45 (9th Cir. 1994):

> "Due notice" is not defined by the RLA, and currently, the Sixth and Seventh Circuits appear to be divided on what notice is due. *Compare Cole v. Erie Lackawanna Ry.*, 541 F.2d 528 (6th Cir. 1976), *cert. denied*, 433 U.S. 914, 97 S.Ct. 2987, 53 L.Ed.2d 1100 (1977), with *O'Neill v. Public Law Bd. No. 550*, 581 F.2d 692 (7th Cir. 1978). In *Cole*, the court held that even when the union represents the employee at the Board hearing, the employee must receive actual notice of the proceedings, though formal notice need be given only to the union. *Id.* at 534. "Actual notice . . . is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." *Id.*
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> * * *

> In *O'Neill*, the Seventh Circuit reached a different conclusion, holding that actual notice is not required if the employee is represented by the union. *O'Neill*, 581 F.2d at 696. Rejecting the Sixth Circuit's conclusion, the *O'Neill* court held that "where an individual employee authorizes his union to represent him . . . and to receive any notices on his behalf, [the RLA] does not require that actual notice be given to the individual employee." *Id.* at 695.

While at first blush it might appear that the Fifth Circuit is in accord with the holding in *O'Neill*, the circumstances were not the same. The employee in *O'Neill* had pre-authorized the union to receive notice, 581 F.2d at 695-96, while Boorstein had not done so.[9] Moreover, in an earlier opinion where no authorization had been obtained from employees whose rights were decided by an RLA Board, the Seventh Circuit held that the failure to comply with § 153 First (j) by failing to give employees notice and depriving them of the right to participate in the hearing resulted in the Board's being without jurisdiction to promulgate its award. The court further held that the district court was correct in enjoining enforcement of the award. *Allain v. Tummon,* 212 F.2d 32, 36-37 (7th Cir. 1954).

The Ninth Circuit determined that the holding in *Cole* requiring actual notice more closely adhered to this Court's pronouncements in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282 (1945) (due notice requires at least knowledge by the employee of the pendency of the

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[9] In fact, the IAM took care to obtain written authorization from Mitchell and Bale for the union to proceed on their behalf at the time they filed their grievances. Appendix A, App. 15, 20-22. Boorstein had not signed such an authorization. She was simply an employee who had no knowledge that her rights were being adjudicated. Appendix A, App. 11-12.

proceedings or sufficient knowledge to put him on notice of the hearing). The Ninth Circuit therefore held that an employee must receive actual notice of a hearing before the Board and sufficient time in which to help the union present his claim. 18 F.3d at 745. In a similar vein, the Sixth Circuit, in *Meeks v. Illinois Cent. Gulf R.R.*, 738 F.2d 748 (6th Cir. 1984) held that a Board's award was without legal effect because the Board gave notice to the union but failed to give personal notice to the employee.

Here, the Board made no attempt to give due notice to Boorstein. Nonetheless, the Fifth Circuit determined that Boorstein and the other affected flight attendants were not entitled to any notice whatsoever.

This Court should grant the Petition to resolve the conflicts among the Circuits with regard to the requirements for due notice so that those whose rights are determined by RLA Boards, those who represent such aggrieved employees, and those who sit on RLA Boards will have the benefit of this Court's resolution of this important issue.

III. REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS REGARDING WHETHER AN "AGGRIEVED" EMPLOYEE UNDER § 153 FIRST (q) OR AN "INVOLVED" EMPLOYEE UNDER § 153 FIRST (j) MUST EXHAUST REMEDIES PRIOR TO FILING SUIT.

The Fifth Circuit dismissed Boorstein's claims based upon her alleged failure to exhaust her collective bargaining remedies, *i.e.*, by not filing a grievance and by not participating in the remedy crafted by the Adjustment Board. Appendix A, App. 11-12, 16. The Fifth Circuit's dismissal on the ground of failure to exhaust is in conflict with the statutory language of the RLA and with the decisions of this Court and numerous Courts of Appeals.

It is undisputed that Boorstein and those similarly situated did not file grievances or seek to have the adverse adjustments of their seniority rights determined by a Board. Had their rights not been made a part of the award of the Board, they would not have had a right to file suit absent their exhausting their collective bargaining remedies. However, once the Board entered its Award creating a process that impacted the flight attendants' rights under the CBA, all of Continental's flight attendants, including Boorstein, became "aggrieved" employees under § 153 First (q) and "involved" employees under § 153 First (j). *See*, Sections I and II.

Without affording notice or the right to be heard to Boorstein and the other flight attendants, the Adjustment Board artificially limited the actionable time period for Continental's arbitrary adjustments to the flight attendants' non-competitive seniority to two years prior to the date of the Board's Decision. The Board also required the flight attendants to seek relief at considerable peril to their seniority. This was so, because the flight attendants did not have access to their records, and the Board's "remedial order" provided that once invoking the process to ascertain if any relief from arbitrary adjustments was due under the Board's own brand of industrial justice, Continental was again free to arbitrarily adjust a flight attendant's seniority. Appendix H, App. 86, 88. The actions of the Board thus brought Boorstein and those similarly situated well into the definitions of "aggrieved" and "involved" employees under § 153 First. As described in Sections I and II, employees who are "aggrieved" and/or "involved" have a right to seek redress in district court without any additional exhaustion of remedies.

Additionally, § 153 First (q) provides that an order of the Board may be set aside in whole or in part or remanded if the Board did not follow the requirements of the

RLA, the Board exceeded its jurisdiction, or the Board acted fraudulently or corruptly. Although the Board found that Continental had failed to properly maintain its flight attendants' seniority system, and that "Adjustment was made for periods of inactivity taken by some individuals when they returned to work, but not for others," Appendix C, App. 53, the relief fashioned by the Board failed to correct the lack of integrity of the seniority system. Instead the Board created an "equitable" solution to address seniority problems engendered by the retroactive and secretive adjustment of seniority rights by Continental. The Board fashioned a remedy that was outside the terms of the CBA, and therefore the Board's imposition of the "equitable" solution was outside the jurisdiction of the Board. *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Company*, 415 F.2d 403, 411-12 (5th Cir. 1969).

The purpose of the seniority provisions of the flight attendants' CBA is to maintain the integrity of the seniority system. The essence of the seniority system is to treat persons on the seniority roster in a fair and equitable manner and not to favor some over others. Yet, by arbitrarily setting cut off dates not anticipated by the CBA, by not requiring the uniform application of seniority adjustments or the rescission of all those adjustments arbitrarily imposed, the remedy fashioned by the Board simply substituted one form of corruption of the seniority system with another equally unfair form.

As the Fifth Circuit itself held in *Brotherhood of Railroad Trainmen*, 415 F.2d at 412:

> . . . an arbitrator does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When

> the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award (citing *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)).

As an "aggrieved employee" Boorstein was entitled under § 153 First (q), to seek redress in district court to overturn the decision of the Board. She did not have to participate in the procedure established by the Board that was wholly "without foundation in reason or fact."[10] Without question the Board exceeded its jurisdiction by imposing its "equitable" solution. Boorstein was within her rights under § 153 First to seek to prevent the enforcement of the improper exercise of the Board's authority. Furthermore, as she was challenging the procedure used by the Board, she was not required to exhaust any remedies pertaining to that procedure, but was entitled to have her claims ruled upon by the district court. *Finnerty v. Cowen*, 508 F.2d 979, 981-82 (2d Cir. 1974). The Fifth Circuit's opinion conflicts with the holding of this Court in *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978) and the holding of the Court of Appeals in *Steward v. Mann*, 351 F.3d 1338 (11th Cir. 2003). This Court should grant the Petition to give guidance to the Courts of Appeals on these important matters.

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[10] The lack of a rational basis for the relief imposed by the Adjustment Board is demonstrated by the results obtained. Of the six individual grievants, three received no relief, and the others each received one week of vacation pay. Of the eleven flight attendants who filed claims, most did not obtain the relief they sought. Appendix D.

IV. REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS REGARDING WHETHER EMPLOYEES SUBJECT TO THE RLA MAY ASSERT CLAIMS UNDER THE CONSTITUTION FOR DENIAL OF DUE PROCESS WHEN THE DEPRIVATION OF RIGHTS RELATES TO ACTIONS BY AN RLA BOARD.

A. A Conflict Exists Among The Circuits Regarding Whether Employees Who Assert Rights Under The RLA May Assert Independent Claims Under The Due Process Clause Of The Constitution.

Petitioners claimed in the district court that they had been denied due process of law as guaranteed by the fifth amendment.[11] Mitchell and Bale alleged that they were denied due process during the hearing before the Board when they were without notice required to represent themselves. Boorstein alleged that she was denied due process when without notice or opportunity to be heard, her rights were adjudicated without her knowledge by the Board. In addition to invoking the district court's jurisdiction pursuant to 45 U.S.C. § 153 First (q), Petitioners invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 and the fifth amendment.

Having improperly relied upon NLRA/LMRA prerequisites to deny Mitchell and Bale standing under the RLA, the Fifth Circuit additionally invoked its newly created standing qualification to preclude federal judicial review of Mitchell and Bale's due process challenge to the validity of

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[11] Petitioners' vested seniority rights are without question "property" within the meaning of the due process clause. *Elmore v. Chicago & Illinois Midland Railway Company*, 782 F.2d 94, 96-97 (7th Cir. 1986).

the Board's actions. Similarly, the Fifth Circuit, having incorrectly determined that Boorstein failed to exhaust her collective bargaining remedies, additionally refused to address Boorstein's constitutional claims. The Fifth Circuit's refusal to review Petitioners' due process claims conflicts with the decisions of this Court and with the holdings of the Second, Seventh, Eighth, and Ninth Circuits as well as with its own precedents which have found either that an independent constitutional claim exists separate and apart from the statutory claims under the RLA or that such a due process claim is a ground for vacating the decision of the Board that is encompassed within the RLA itself.[12]

In *Atchison, Topeka and Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), this Court held that the RLA's binding arbitration provisions did not deprive the district court of jurisdiction to hear an employee's claim against his employer for personal injuries arising under the Federal Employers' Liability Act. This Court unanimously rejected the railroad's argument that the employee was required to resort to the grievance machinery under the RLA, and that the grievance procedure was his sole remedy. In rejecting the railroad's argument, this Court noted that the RLA did not preempt other federal statutes that provided rights outside the scope of those covered by the RLA. *Id.* at 565.

While the independent claim in *Buell* was a federal statutory claim, the lower courts have applied *Buell*'s

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[12] Because Boards created pursuant to the RLA are federal bodies, their actions must pass federal constitutional muster. *Shafii v. PLC British Airways*, 22 F.3d 59 (2d Cir. 1994); *English v. Burlington Northern R.R.*, 18 F.3d 741 (9th Cir. 1994); *see also, Elmore v. Chicago & Illinois Midland Railway Company*, 782 F.2d at 96-97.

holding and reasoning to constitutional claims asserted by employees covered by the RLA. *Coppinger v. Metro-North Commuter Railroad*, 861 F.2d 33 (2d Cir. 1988). As the Second Circuit in *Coppinger* observed:

> For purposes of the narrow jurisdictional question now before us, we are persuaded that there is no principled basis upon which to distinguish § 1983 from the FELA at issue in *Buell*. In enacting § 1983 Congress aimed to create an independent scheme for redressing constitutional wrongs to aggrieved individuals by providing a federal cause of action. Nothing in the statutory plan suggests that a prior determination in an arbitration proceeding prevents a plaintiff from bringing suit in federal court or divests that court of jurisdiction.
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> * * *
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> More recently in *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988), the Supreme Court stated that when Congress' purpose is to preclude judicial review of a constitutional claim it must make its purpose plain. *Id.* 108 S.Ct. at 2053. No such aim may be discerned in either the RLA or § 1983.

Id. at 37. The Second Circuit continued:

> We hold therefore that the rights guaranteed all citizens by the Fourth Amendment and under § 1983, and the strong public policy favoring arbitration that underlies the RLA must allow appellant to pursue his contractual remedy under the RLA and his separate cause of action under § 1983 independently of one another.

Id. at 39.[13] This Court should resolve the conflict with regard to whether employees covered by the RLA are permitted to pursue an independent claim of denial of due process in seeking to overturn the adverse decision of a Board.

B. A Conflict Exists Among The Circuits As To Whether Due Process Claims Are Cognizable Under The Railway Labor Act Itself.

Although the Fifth Circuit precluded Petitioners from prosecuting their respective due process claims under the RLA, the Fifth Circuit had previously been among those Circuits that allowed a federal court to review due process claims under the RLA. *See, Goff v. Dakota, Minnesota & E. R.R. Corp.*, 276 F.3d 992, 997 (8th Cir. 2002); *Atchison, Topeka and Santa Fe Ry. Co. v. United Transp. Union,* 165 F.3d 355, 357 (5th Cir. 1999); *Pokuta v. Trans World Airlines, Inc.*, 191 F.3d 834, 839 (7th Cir. 1999); *Shafii v. PLC British Airways,* 22 F.3d 59, 64 (2d Cir. 1994); *English v. Burlington N. R.R. Co.,* 18 F.3d 741, 744 (9th Cir. 1994); *Hayes v. Western Weighing & Inspection Bureau,* 838 F.2d 1434, 1436 (5th Cir. 1988); *Steffens v. Brotherhood of Ry., Airline & S.S. Clerks*, 797 F.2d 442 (7th Cir. 1986); *Armstrong Lodge No. 762 v. Union Pacific R.R.*, 783 F.2d 131, 135 (8th Cir. 1986); *Radin v. United States*, 699 F.2d 681, 684 (4th Cir. 1983); *Hall v. Eastern Air Lines, Inc.,* 511 F.2d 663 (5th Cir. 1975); *Rosen v. Eastern Air Lines*, 400 F.2d 462, 464 (5th Cir. 1968), *cert. denied*, 394 U.S. 959, 89 S.Ct. 1307, 22 L.Ed.2d 560 (1969); *D'Elia v. New York, N.H. & H. R.R.*, 338 F.2d 701, 702 (2d Cir. 1964)

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[13] While the Second Circuit in *Coppinger* focused on 42 U.S.C. § 1983 as a jurisdictional grant to prosecute a constitutional claim, in fact, this Court has held that a person may vindicate federal due process rights by direct action under the fifth amendment. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

(per curiam), *cert. denied*, 380 U.S. 978, 85 S.Ct. 1340, 14 L.Ed.2d 272 (1965).

Now, denying an employee covered by the RLA who cannot also show a breach of his union's duty of fair representation the right to have his or her constitutional challenges heard, the Fifth Circuit has joined the Circuits that do not permit a federal court to review due process claims under the RLA. *See*, *Kimross v. Utah Ry. Co.*, 362 F.3d 658, 662 (10th Cir. 2004); *Jones v. Seaboard Sys. R.R.*, 783 F.2d 639, 642 n.2 (6th Cir. 1986); *Henry v. Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985); *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 911-12 (3d Cir. 1981). This Court should resolve the conflict among the Circuits regarding the important issue of whether and to what extent a court may entertain constitutional due process claims brought for the purpose of reviewing the actions of RLA Boards.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

STUART M. NELKIN*
CAROL NELKIN
JAY P. NELKIN
NELKIN & NELKIN, P. C.
5417 Chaucer
Houston, TX 77005
713-526-4500
Attorneys for Petitioners

**Counsel of Record*

481 F.3d 225

United States Court of Appeals, Fifth Circuit.

Marilyn MITCHELL; Kevin Bale; Susan Boorstein, Plaintiffs-Appellants,

v.

CONTINENTAL AIRLINES, INC.; International Association of Machinists and Aerospace Workers, Defendants-Appellees.

No. 05-20791.

March 7, 2007.

Carol L. Nelkin (argued), Stuart M. Nelkin, Jay P. Nelkin, Nelkin & Nelkin, Houston, TX, for Plaintiffs-Appellants.

Jon A. Geier, Paul, Hastings, Janofsky & Walker, Washington, DC, Louis K. Obdyke, IV, Houston TX, Kelly Jean Koelker, Paul, Hastings, Janofsky & Walker, Atlanta, GA, for Continental Airlines.

John A. Edmond (argued), Guerrieri, Edmond, Clayman & Bartos, Washington, DC, Marc A. Zito, Houston, TX, for Intern. Ass'n of Mach. & Aerospace Workers.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, WIENER, and CLEMENT, Circuit Judges.

WIENER, Circuit Judge:

Plaintiffs-Appellants Marilyn Mitchell, Kevin Bale, and Susan Boorstein appeal the district court's grant of summary judgment, dismissing without prejudice their

petition to vacate an arbitration award under the Railway Labor Act ("RLA").[1] For the following reasons, we affirm the district court, concluding that Boorstein failed to exhaust her contractually-created procedural remedies and that Mitchell and Bale lack standing to bring a petition under the RLA.

I. FACTS AND PROCEEDINGS

A. *Background*

The plaintiffs are flight attendants for Defendant-Appellee Continental Airlines, Inc. ("Continental"). As such, their employment is governed by a collective bargaining agreement ("CBA") between Continental and Defendant-Appellee International Association of Machinists and Aerospace Workers ("IAM"). The CBA provides a system of procedures for the resolution of employment grievances, ultimately requiring that unresolved grievances be resolved by final and binding arbitration before a Systems Board of Adjustment ("the Board"), as is permitted by the RLA. In addition, the CBA specifies that the IAM shall serve as the exclusive bargaining representative for all flight attendants.

Under the CBA, Continental's flight attendants accrue various types of seniority, each of which is classified as either competitive or non-competitive. Continental is required to post competitive seniority dates biennially. Flight attendants have thirty days after each such posting to challenge the accuracy. Competitive seniority is not at issue in this case; non-competitive seniority is, though.

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[1] 45 U.S.C. §§ 151 *et seq.*

Continental is not required to post non-competitive seniority dates for its flight attendants. Non-competitive rankings include pay seniority, vacation seniority, and jump-seat and pass-riding seniority. Instead of posting lists of non-competitive seniority periodically, they are communicated in other, more discrete ways.

B. *Boorstein*

Boorstein had been employed as a Continental flight attendant since November 1968, when in 1996, she learned that her jump-seat seniority date had been changed from her date of hire to a subsequent date in 1971. She also learned that her company service date had been unfavorably changed when, on her thirtieth anniversary with Continental, she received a cake of the type customarily given to flight attendants with only twenty years of service. Boorstein alleges that, after she inquired into the unfavorable adjustments, her seniority status was again adjusted adversely. Boorstein never filed a grievance against Continental and never sought to resolve her dispute through arbitration before the Board.

C. ***Mitchell***

Mitchell began her employment with Continental in January 1969, and began flying the next month. In 1996, Mitchell's pass-riding seniority date was retroactively adjusted without her knowledge as a result of company-offered leave that she had taken years earlier.[2] The next

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[2] Company-offered leave is optional leave offered by Continental to its flight attendants. It is offered to those attendants with higher seniority in lieu of leave being forced on junior flight attendants (i.e.,

(Continued on following page)

year, Mitchell also discovered that her vacation seniority date was different and less advantageous than previously indicated. Throughout 1997 and 1998, Mitchell repeatedly contacted and questioned Continental personnel regarding the accuracy of her seniority dates. She alleges that her questioning led to even greater unfavorable adjustments.

Unable to resolve her inquiries satisfactorily, Mitchell contacted IAM in 1999. After prolonged discussions, IAM eventually permitted Mitchell to file a grievance against Continental, in which she contended that her non-competitive seniority dates had been subjected to unfair, adverse adjustments. That was in May 2000. Her grievance was denied following a step-one and a step-two hearing.

D. ***Bale***

Bale joined Continental as a flight attendant in July 1987. In 1997, he discovered that his vacation seniority date was less advantageous than his records indicated it should have been. Bale periodically inquired into the discrepancy between 1998 and 2000. He was eventually informed that his vacation seniority date had been adjusted for company-offered leaves that he had taken between 1991 and 1995.

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furlough status), thereby alleviating the effect of overstaffing and base closings. This is advantageous to Continental, because its payroll expense is reduced by having lower paid flight attendants on duty, as Continental does not have to pay its senior flight attendants who are on company-offered leave and does not have to pay furlough pay to junior flight attendants who would otherwise be on furlough status.

In August 2000, Bale filed a grievance, complaining of unfair and unequal adjustment of seniority. In June 2001, Bale filed a second grievance, complaining that Continental violated the CBA by including managerial employees at the level of director or above in the System Seniority List. Both of these grievances were denied following a step-one and a step-two hearing.

E. *Involvement of IAM*

A stamped, and then signed and dated notice appears in the upper, right-hand corner of both Mitchell's and Bales' grievances, in which each attendant acknowledged: "I hereby authorize the International Association of Machinists, with full power of attorney, to represent me in all stages of the Grievance Procedure in the presenting and settling of this grievance." After Mitchell's and Bale's grievances were denied by Continental, they were referred to arbitration before the Board, which consisted of one IAM representative, one Continental representative, and one neutral chairperson. As the IAM had previously learned that several other flight attendants' non-competitive seniority dates had been unfavorably adjusted without their knowledge, it presented with those of Mitchell and Bale the grievances of four similarly-situated flight attendants in a two-day arbitration hearing before the Board in February 2002.

Prior to this hearing being held, Mitchell and Bale had received numerous notices of the hearing dates and locations, the hearing date having been postponed and rescheduled numerous times. In addition, both Mitchell and Bale met with IAM representatives in 2001, and

Mitchell attended a second preparatory meeting in February 2002.

When the hearing was finally convened in February 2002, Mitchell participated in person and Bale participated by telephone. Both Mitchell and Bale allege that, immediately before the hearing, IAM informed them that it would not be representing them, so they would have to represent themselves. Both claim that they thus were "ambushed" into putting on their own, admittedly deficient, *pro se* case.

In May 2002, the Board rendered its arbitral decision and award ("the Award"). The Board first decided that it lacked jurisdiction over matters arising before the date that the CBA was formed, April 1, 2000. It then concluded that Continental had failed to maintain "a careful record of when an individual returned to work from a leave of absence for purposes of his or her seniority" and that "[a]djustments [were] made for periods of inactivity taken by some individuals when they returned to work, but not for others." After acknowledging Continental's failure to maintain careful records and declaring that it was unable to "examine all of the individual employment records of the [more than 9,000] flight attendants employed by Continental," the Board prescribed the following procedure to be used by flight attendants retrospectively challenging their seniority dates and for Continental's use in making future adjustments:

> [F]or retroactive adjustments that occurred within the last two years, flight attendants may protest such adjustments in their seniority dates which occurred more than a year after the event which triggered the adjustment. They may do so within 30 days of the date on which this award is

> rendered, and the parties shall have the joint obligation of informing all flight attendants of this decision. . . . For the future, the company shall have a period of one year from the date on which they first were notified by the Company . . . to file a protest.

In the Award, the Board also (1) decided that its ruling would apply to Bale's grievance and provided the IAM and Continental an opportunity to resolve his grievance amicably based on the rules set forth in the Award; (2) denied as untimely those grievances relating to individuals holding managerial positions at the director level and higher as untimely; and (3) denied Mitchell's grievances "because the adjustments were made contemporaneously and in order to retain seniority one must be on the list of Company employees and to accrue seniority one must be in the active service of the Company and be receiving pay for such service." Finally, the Board retained jurisdiction over "all disputes arising based upon this decision including questions regarding remedy."

Continental and IAM then issued a joint notice to all flight attendants, informing them of the existence of the Award, its terms and conditions, and the deadline for filing claims pursuant to the Award. In October of that year, after negotiations between Bale and Continental proved unsuccessful, the Board issued a second arbitral award, finding that the seniority adjustments of which Bale complained "were actually made in September 1998, outside the timeframe for claims that can be submitted under the [Award]." The Board, therefore, denied Bale's grievance.

In May 2004, the plaintiffs filed a petition for review of the Award in the Southern District of Florida, requesting

that the district court (1) enjoin Continental from implementing the Award, (2) vacate the Award, and (3) remand the matter to the Board. The plaintiffs contended that the Award failed to comply with and conform to the requirements of the RLA and that it violated their constitutional right to due process. In August 2004, the Southern District of Florida transferred the action to the District Court for the Southern District of Texas, from which this appeal is taken.

In August 2005, the district court, treating the plaintiffs' petition for review and defendants' opposition to it as cross-motions for summary judgment, denied the plaintiffs' petition for review and entered judgment in favor of Continental and IAM, concluding that the plaintiffs' failure to allege a breach of IAM's duty of fair representation left them without standing. In addition, the district court dismissed the plaintiffs' constitutional due process claims, ruling that the plaintiffs had failed to state a claim for which relief could be granted. The plaintiffs timely filed a notice of appeal.

II. LAW AND ANALYSIS

A. *Standard of Review*

We review a grant of summary judgment *de novo,* applying the same standard as the district court.[3] The RLA regulates labor disputes between airline carriers and their employees by establishing mandatory procedures for the

[3] *Riverwood Int'l Corp. v. Employers Ins. of Wausau,* 420 F.3d 378, 382 (5th Cir.2005).

resolution of disputes, both major and minor, to prevent the commercial interruptions that might otherwise result.[4]

The RLA distinguishes disputes by whether they seek to create contractual rights or to enforce them.[5] A major dispute concerns the formation of a CBA, which arises when a CBA is not in place or when a party seeks to change the terms of a CBA.[6] A minor dispute concerns grievances or the interpretation or application of agreements covering rates of pay, rules, or working conditions.[7] Pursuant to the RLA, minor disputes must be resolved through a compulsory, binding arbitration procedure before an adjustment board. These arbitral procedures may be established by the union and the employer through their CBA.[8] None questions that the disputes underlying this appeal are minor ones under the RLA.

Prior to filing a RLA lawsuit in federal court, employees claiming a violation of their CBA-established rights ordinarily must first exhaust the non-judicial remedies specified in their CBA.[9] An employee may, however, bring suit without previously exhausting these remedies if (1) the union wrongfully refuses to process the employee's grievance, thereby violating its duty of fair representation; (2) the employer's conduct amounts to a repudiation of the

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[4] *Cont'l Airlines, Inc. v. Int'l Bhd. Of Teamsters,* 391 F.3d 613, 616-17 (5th Cir.2004).

[5] *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n,* 491 U.S. 299, 302, 109 S.Ct. 2477, 105 L.Ed.2d 250 (1989).

[6] *Id.*

[7] *Id.* at 303, 109 S.Ct. 2477.

[8] *Id.*

[9] *Morales v. S. Pac. Transp. Co.,* 894 F.2d 743, 745 (5th Cir.1990).

specified contractual, remedial procedures; or (3) exhaustion of the contractual remedies would be futile.[10]

When an RLA lawsuit arising from a minor dispute is properly before us, we will only review an arbitral decision and award on one of three narrow and exclusive grounds: (1) whether the Board failed to comply with the RLA's requirements; (2) whether the Board failed to confine itself to matters within the scope of its jurisdiction; and (3) whether the Board's decision was the result of fraud or corruption.[11] We have recognized a fourth, implied ground for review: whether an award was rendered in violation of a party's due process rights.[12] Absent one of these grounds, an adjustment board's findings and orders are binding and conclusive as to the parties.[13] Thus, unless we find that an adjustment board's arbitral award is "wholly baseless and completely without reason," we must affirm the Board's decision.[14]

B. *Merits*

On appeal, the plaintiffs contend that the district court erroneously granted summary judgment in favor of Continental and IAM (collectively, "the defendants"), because (1) the plaintiffs do have standing to bring an action under the RLA; (2) the plaintiffs were unconstitutionally

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[10] *Rabalais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir.1978).

[11] *Cont'l Airlines*, 391 F.3d at 617.

[12] *Bhd. of Locomotive Eng'rs v. St. Louis Sw. Ry. Co.*, 757 F.2d 656, 661 (5th Cir.1985).

[13] *E. Air Lines, Inc. v. Transp. Workers Union*, 580 F.2d 169, 172 (5th Cir.1978).

[14] *Id.*

denied due process, as they were not provided sufficient notice, and the Board failed to maintain a record of the arbitral hearing; and (3) the Award was "wholly baseless and completely without reason." The plaintiffs explicitly disavow any claim that the IAM breached its duty of fair representation.

In contrast, the defendants urge us to affirm the district court, because (1) Boorstein failed to exhaust the requisite arbitral remedies under the CBA; (2) all of the plaintiffs lack standing to bring an RLA action; (3) the plaintiffs' constitutional due-process rights were not violated; and (4) the Award was not "wholly baseless and completely without reason."

i. *Boorstein's Claim*

On appeal, Continental argues that Boorstein's claim is not viable because of her failure to exhaust her non-judicial remedies under the CBA. We agree.

It is undisputed that Boorstein not only failed to file a grievance regarding the unfavorable adjustment of her non-competitive seniority, but, despite receiving notice of her right to do so, she failed to request review and correction of any adjustment within the thirty-day period made available to all flight attendants by the Board's award, all in derogation of the CBA. Boorstein does not offer, and our own review fails to reveal, any reason why her failure to pursue the appropriate remedies under the CBA should be excused.

In addition, the Board was not required to provide Boorstein with personal notice of the February 2002 hearing. As a flight attendant and thus a subscriber to the

CBA, Boorstein had authorized the IAM to act exclusively on her behalf. Thus, as the district court correctly recognized, notice to the IAM-Boorstein's representative-constituted adequate notice to Boorstein and all similarly-situated employees who had not filed individual grievances.[15] We affirm the district court's dismissal of Boorstein's claims.

ii. *Mitchell's and Bale's Claims*

In *McNair v. United States Postal Service,* we held that, under the Labor Management Relations Act ("LMRA"),[16] which was made applicable by the Postal Reorganization Act[17]:

> When a collective bargaining agreement establishes a mandatory, binding grievance procedure and gives the union the exclusive right to pursue claims on behalf of aggrieved employees, the results obtained by the union are normally conclusive of the employees' rights under the agreement. This means, of course, that an aggrieved worker whose employment is governed by such an agreement normally lacks standing independently . . . to attack in court the results of the grievance process. . . .
>
> These rules are not, however, without exception. It is established that, if the union has breached its duty of fair representation, by arbitrarily refusing to pursue a claim through the grievance process or by doing so in a perfunctory

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[15] *See Bhd. of Ry., Airline, & S.S. Clerks v. St. Louis S.W. Ry. Co.,* 676 F.2d 132, 136 (5th Cir.1982).

[16] 29 U.S.C. §§ 141 *et seq.*

[17] 39 U.S.C. § 1209.

or otherwise inadequate manner, an aggrieved employee is not foreclosed by the results of the grievance process. He may sue his employer or his union or both but, in order to recover, he must prove that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement.[18]

As we explained in *Acuff v. United Papermakers & Paperworkers,* which was decided under the National Labor Relations Act ("NLRA"),[19] this reality is necessary to effectuate the purposes behind federal labor statutes, which require that the interests of particular individuals be subordinated to the interests of the group at the contract-negotiation stage and beyond.[20] If an employee could compel arbitration of a grievance without his union's blessings, a CBA's contractual conflict-resolution procedures would be substantially undermined, "thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation."[21] The same can be said of an employee's ability to seek judicial review of an arbitral award, after being abandoned by his union.[22]

Here, the plaintiffs recognize our decisions in *McNair* and *Acuff* and do not dispute their holdings, agreeing that an individual employee lacks standing to seek review of an arbitral award under the LMRA and NLRA, except that an

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[18] 768 F.2d 730, 735 (5th Cir.1985).

[19] 29 U.S.C. §§ 151 *et seq.*

[20] 404 F.2d 169, 171 (5th Cir.1969).

[21] *Vaca v. Sipes,* 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

[22] *McNair,* 768 F.2d at 735.

employee may bring a claim that the union breached its duty of fair representation. Rather, the plaintiffs contend that our holdings in *McNair* and *Acuff* are limited to LMRA and NLRA claims; so they argue that they are not barred from bringing claims under the RLA. The plaintiffs, however, offer no support or reasoning for why claims grounded in the RLA should be treated differently from claims under the LMRA or the NLRA, other than their transparent acronymic differences or location within the United States Code.

Indeed, we see the plaintiffs' argument as constituting a distinction without difference. Regardless of whether a CBA is established under the LMRA, NLRA, or RLA, its existence is premised on effectuating a key purpose behind federal labor statutes, viz., placing the interests of the group ahead of the interests of the individual employees. As we have previously recognized, it would be "paradoxical in the extreme" if a union that is vested with the exclusive authority to bring an employment grievance and pursue it up to and through binding arbitration were not likewise vested with the exclusive responsibility to instigate and prosecute a review of an arbitral award in court.[23] Thus, for the same reasons articulated in *McNair* and *Acuff*, we conclude that, when a CBA formed pursuant to the RLA establishes a mandatory, binding grievance procedure and vests the union with the exclusive right to pursue claims on behalf of aggrieved employees, an aggrieved employee whose employment is governed by the CBA lacks standing to attack the results of the grievance process in court – the

[23] *Acuff*, 404 F.2d at 171.

sole exception being the authorization of an aggrieved employee to bring an unfair representation claim.[24]

Here, the plaintiffs expressly disavowed any claim that IAM breached its duty of fair representation. Moreover, the CBA explicitly establishes that the IAM shall represent all flight attendants in grievance procedures. Both Mitchell and Bale specifically bestowed on the IAM (and never revoked) full power of attorney to represent them at all stages of the grievance procedure. We therefore affirm the district court's conclusion that Mitchell and Bale lacked standing to petition for review of the Award.[25]

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[24] *Contra McQuestion v. N.J. Transit Rail Operations*, 892 F.2d 352, 354-55 (3d Cir.1990) (concluding that the plain language of 45 U.S.C. § 153. First (q) provides individual employees with uniquely individual grievances standing to bring in federal court a petition for review of a arbitral hearing initiated pursuant to the RLA). Unlike the underlying arbitral hearing here, which was brought by the IAM on behalf of all Continental flight attendants, the arbitration in *McQuestion* was "conducted solely to resolve appellants' uniquely individual grievance," such that the two plaintiffs/employees in *McQuestion* were the " 'real parties in interest.' " *Id.* at 354 (quoting *McQuestion v. N.J. Transit Rail Operations*, No. 88-4037, slip op. at 10 (D.N.J. May 12, 1989)). We do not foreclose and need not decide today whether an individual employee may ever bring such "uniquely individual claims," rendering him the "real party in interest," such that § 153 First (q) provides him standing to bring an RLA claim. Rather, under the facts presented here and those of our precedent, an aggrieved employee will generally lack standing to bring an RLA action.

[25] As we have concluded that Boorstein failed to exhaust her CBA-created procedural remedies and that Mitchell and Bale lack standing to bring a petition for review under the RLA, we need not reach the plaintiffs' constitutional due-process claims or their contention that the Award was "wholly baseless and completely without reason."

III. CONCLUSION

Today, we logically extend our holdings in *McNair* and *Acuff* to RLA cases, concluding that when a CBA that is formed pursuant to the RLA establishes a mandatory, binding grievance procedure and gives the union the exclusive right to pursue claims on behalf of aggrieved employees, one whose employment is governed by the CBA lacks standing to attack the results of the grievance process in court, except only that an employee has standing to bring a claim of unfair representation. We also acknowledge and apply our precedent that requires an employee to exhaust his procedural remedies under a CBA before commencing a RLA lawsuit. Based on the applicable law and our extensive review of the parties' briefs and the record on appeal, we conclude that the district court did not commit any error. Accordingly, we affirm the summary judgment of the district court in favor of the defendants.

AFFIRMED.

2005 WL 2708192

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARILYN MITCHELL, KEVIN BALE, and SUSAN BOORSTEIN,	§	CIVIL ACTION NO. H-04-3470
Plaintiffs,	§	
v.	§	
CONTINENTAL AIRLINES, INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Plaintiffs, Marilyn Mitchell, Kevin Bale, and Susan Boorstein, bring this action against Continental Airlines, Inc. (Continental) and the International Association of Machinists and Aerospace Workers (IAMAW) seeking to vacate the Decision of the Chairman and Award of the System Board of Adjustment (Decision and Award) in the arbitration between IAMAW and Continental on grievances brought by Mitchell, Bale, and others regarding Continental's retroactive adjustment of flight attendants' seniority dates. Pending before the court is Plaintiffs' Petition for Review (Docket Entry No. 1). The parties agree that the case should be resolved by dispositive

motion.[1] For the reasons explained below, the court concludes that the petition should be denied, and this action dismissed.

I. Factual Background

Plaintiffs are Continental flight attendants whose employment is governed by a collective bargaining agreement (CBA) between Continental and the IAMAW under which the IAMAW serves as the exclusive bargaining representative for all flight attendants.[2] The CBA contains, *inter alia,* procedures for resolving grievances over the construction and application of its terms, which

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[1] Plaintiffs' Reply Brief in Support of Petition for Review, Docket Entry No. 54, p. 2 n.1.

[2] See Petition for Review (PR), Docket Entry No. 1, ¶ 2, and Excerpts for Agreement between Continental Airlines, Inc. and IAMAW, Exhibit 3 in Joint Appendix to Briefs of Continental Airlines, Inc., and IAMAW, attached to Docket Entry No. 47 (Joint Appendix). All exhibits contained in the Joint Appendix are authenticated by the Declaration of Robert S. Clayman, IAMAW's counsel at the arbitration hearing (Clayman Declaration). Although plaintiffs argue that many of the exhibits in the Joint Appendix should be stricken because Clayman has not properly authenticated his Declaration, plaintiffs have not argued that the grievance procedures they followed are non-binding, or that the exhibits contained in the Joint Appendix are not the documents that defendants represent them to be, i.e., true copies of excerpts from the CBA, grievances filed with Continental, exhibits presented to the arbitration board, and communications between the parties. Moreover, the Joint Appendix contains many exhibits to which plaintiffs have lodged no objection. The only exhibits on which the court has relied are exhibits to which plaintiffs have not objected. See Objections to the Exhibits in Defendants' Joint Appendix, Exhibit A attached to Plaintiffs' Reply Brief in Support of Petition for Review, Docket Entry No. 54.

provide for final and binding arbitration before a Systems Board of Adjustment.[3]

Continental flight attendants accrue various types of seniority, which are classified as either competitive or non-competitive. The CBA requires Continental to post bi-annually a list of flight attendants' competitive seniority dates. Flight attendants have thirty days after the list is posted to protest errors. Competitive seniority is not at issue in this case. (PR ¶ 14) The CBA does not require Continental to post flight attendants' non-competitive seniority dates. (PR ¶ 15) Instead, non-competitive seniority dates are communicated to flight attendants in various ways. Pay seniority dates appear on pay stubs. Vacation seniority is reported in annual statements to individual flight attendants. Jump-seat and pass-riding seniority is based either on the "JA" entry in Continental's SONIC computer system or on the date showing on a company identification card. Flight attendants requesting tickets on-line have sometimes been surprised to find that their jump-seat and pass-riding seniority dates have been adjusted without notice. (PR ¶ 17)

In 1996 Boorstein learned that her jump-seat seniority date had been changed from her date of hire, November 11, 1968, to a date in 1971. (PR ¶ 62) When she belatedly received a cake for her 30th anniversary with Continental, Boorstein learned that her company service date had also been changed. (PR ¶ 63) Boorstein alleges that when she

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[3] See Exhibit 3 in the Joint Appendix and Clayman Declaration, ¶ 3. Clayman explains that a Systems Board of Adjustment is the airline industry counterpart of the statutorily established National Railway Adjustment Board (NRAB) process for resolving industry-related disputes. *See* 45 U.S.C. §§ 153, 184

inquired about the adjustments "her seniority was again adversely and unequally impacted." (PR ¶ 64)

In 1997 Mitchell discovered that her vacation seniority date was less advantageous than her records indicated it should have been. (PR ¶ 25) Mitchell alleges that when she questioned the accuracy of her vacation seniority date, Continental readjusted it even less favorably. (PR ¶ 25) In 1999 Mitchell contacted the IAMAW "about various seniority and contract violations." (PR ¶ 31) Plaintiffs allege that during a meeting with a representative of Continental's Human Resources office Mitchell was told that "Continental was aware that everyone had not been similarly adjusted . . . but . . . that Continental did not have the time or the manpower to go through the records of 25,000 flight attendants to determine if the seniority dates were adjusted as they should have been." (PR ¶ 35)

On May 24, 2000, Mitchell filed grievance no. 05446 in which she complained that on May 20, 2000, unfair, adverse adjustments were made to her non-competitive seniority dates. (PR ¶ 37) In the top, right-hand corner of the grievance is a stamped notice signed and dated by Mitchell that states: "I hereby authorize the International Association of Machinists, with full power of attorney, to represent me in all stages of the Grievance Procedure in the presenting and settling of this grievance."[4] Mitchell's grievance was denied following both a step-one hearing held on July 12, 2000, and a step-two hearing held on September 8, 2000. (PR ¶ 38) Although originally set for April 10, 2001, arbitration before the National Mediation

[4] See Exhibit 8 in the Joint Appendix at page 9.

Board took place in Washington, D.C., on February 5-6, 2002. (PR ¶¶ 38-41)

In 1997 Bale discovered that his vacation seniority date was less advantageous than his records indicated it should have been. (PR ¶¶ 50-51) In the fall of 2000 Bale contacted Continental's Human Resources Department to inquire about his non-competitive seniority dates. (PR ¶ 53) Plaintiffs allege that on October 30, 2000, Continental advised Bale that his seniority dates had been adjusted for company offered leaves that he had taken between 1991 and 1995. (PR ¶ 53) Based on Bales' rate of pay, plaintiffs allege that Bale's vacation seniority date must have been adjusted sometime after 1996 and before Bale was to have received an extra week of vacation in 1997. (PR ¶¶ 51 and 55)

On August 15, 2000, Bale filed a grievance no. 06082 in which he complained that on that date Continental engaged in an unfair and unequal adjustment of non-competitive jump-seat seniority.[5] (PR ¶ 57) On June 27, 2001, Bale filed grievance no. 06540 in which he complained that on May 30, 2001, Continental violated the CBA by including Diane Carr and others in the same category (i.e., managerial employees at the level of director or above) in the jump-seat seniority system.[6] (PR ¶ 57) In the top, right-hand corner of each of Bale's grievances is a stamped notice signed and dated by Bale that states: "I hereby authorize the International Association of Machinists, with full power of attorney, to represent me in all stages of the Grievance Procedure in the presenting and

[5] See Exhibit 5 in the Joint Appendix.

[6] See Exhibit 20 in the Joint Appendix.

settling of this grievance."[7] Each of Bale's grievances was denied following both step-one and step-two hearings.[8] (PR ¶ 57) Continental explained that Bale's non-competitive jump-seat seniority date had been adjusted in compliance with various work rules and agreements that allow flight attendants to maintain but not to accrue non-competitive seniority during periods of personal and/or company offered leave. An arbitration was scheduled for February 5, 2002. (PR 57)

Mitchell's grievance no. 05446 and Bale's grievance nos. 06082 and 06540 were considered together with grievances filed by three other individuals (Sonnichsen, Bice, and Shaw) at an arbitration hearing conducted by a three-person System Board (Board) consisting of a union representative, a company representative, and a neutral third-party chair on February 5-6, 2002, in Washington, D.C.[9] "The five individual grievances, which [were] brought together for decision, all involve[d] adjustments to vacation, pass, or company seniority, and all of which were made substantially after the events occurred which occasioned the adjustment of seniority by the company."[10] "Testimony indicated that some adjustments were made when an individual flight attendant asked a question regarding his or her seniority. Accordingly, in certain cases adjustments were made for some flight attendants, but not for others."[11]

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[7] See Exhibit 5 (grievance no. 06082) at page 5 and Exhibit 20 (grievance no. 06540) at page 4, in the Joint Appendix.

[8] See Exhibits 5 and 20 in the Joint Appendix.

[9] See Decision of the Chairman and Award of the Board, Exhibit 1 in the Joint Appendix at page 2.

[10] *Id.* at p. 2.

[11] *Id.* at p. 4.

The Board identified the issue in dispute – "Were the various adjustments which were made to flight attendant seniority proper, as in some cases they were made long after the events which caused the adjustments, and, if not, what is the appropriate remedy?"[12]

The IAMAW argued to the Board that

> the doctrine of estoppel bars the company from retroactively altering seniority dates to correct errors that the company has permitted to stand for long periods of time. It further contend[ed] that the doctrine of laches bars the company from belatedly asserting a right to adjust seniority. Finally, the [IAMAW] contend[ed] that the principles of disparate treatment prohibit the company from selectively adjusting seniority rights. As a remedy the [IAMAW] suggest[ed] that: (1) the company be prohibited from making any adjustments to grievants' seniority to reflect an event that occurred more than one year in the past; (2) that the company be required to make grievants whole for the vacation and other benefits lost as a result of the company's adjustments to their seniority; (3) that, in the future, the company may only look back for one year in making adjustments to seniority, and that flight attendants have one year in which to challenge such seniority adjustments; and (4) that for a sixty (60) day period following the issuance of the decision in this case, flight attendants may notify the company that it retroactively adjusted their seniority to reflect an event that occurred more than one year ago and that the company shall rescind such adjustments and make the affected

[12] *Id.*

> flight attendants whole for the vacation and other benefits lost as a result of the company's adjustments to their seniority.[13]

Continental argued that it had the right to adjust flight attendants' non-competitive seniority dates in compliance with work rules and agreements that allow flight attendants to maintain but not to accrue non-competitive seniority during periods of personal and/or company offered leave. Continental contended that it "should not be held to the same time limits of thirty (30) days which are contained in the collective bargaining agreement because nothing in that agreement or the past practice of the parties indicates any intent to place such restrictions on the company's ability to administer seniority adjustments."[14] Continental also argued that

> [u]nderlying time limits on filing of claims is the interest in discouraging 'sleeping on one's rights' or appearing to acquiesce to a given policy or practice. In contrast, there is no reason or principle justifying rejection, based merely on the passage of time, of accurate seniority adjustments. [Continental suggested that if the Board concludes that the timing of adjustments is subject to some rule of reasonableness, a time limit far different from the 30-day period for filing protests and grievances must be used. It suggest[ed] that it should be no less than one calendar year after conclusion of the event giving rise to the adjustment (such as the flight attendant returning to active duty), or after the regular publication of the seniority date (such as for vacation seniority).

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[13] *Id.* at pp. 4-5.

[14] *Id.* at p. 5.

> [Continental also argued] that if it is limited to going back one year, flight attendants likewise should be limited in seeking revisions of established seniority, or adjustments made to seniority, more than one year prior to the date of the adjustment.[15]

The Board first decided that it lacked "jurisdiction to go back further than the beginning of the collective bargaining agreement between the Company and the IAM[AW] at the time the grievances being heard were filed,"[16] i.e., April 1, 2000.[17] The board then decided that

> for retroactive adjustments that occurred within the last two years [beginning on the date of the award, i.e., May 17, 2002], flight attendants may protest such adjustments in their seniority dates which occurred more than a year after the event which triggered the adjustment. They may do so within 30 days of the date on which this award is rendered, and the parties shall have the joint obligation of informing all flight attendants of this decision. Flight attendants who are on leaves of absence shall have 30 days after their return to duty to file such protests. In the event a flight attendant files such a protest, the company may look at any event which concluded during the two-year period and make adjustments to include any non-duty time which ended during that two-year period. For the future, the company shall have a period of one year from the date on which a flight attendant returns to duty to adjust his or

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[15] *Id.* at pp. 5-6.

[16] *Id.* at pp. 6-7.

[17] See Title Page of Agreement between Continental Airlines, Inc. and IAMAW, Exhibit 3 in the Joint Appendix.

> her seniority date. Likewise, flight attendants will be limited in challenging adjustments made to seniority more than one year prior to the date of the adjustment. Within that time parameter, individual flight attendants shall have 30 days from the date on which they first were notified by the Company (e.g., System Seniority posting, pay register, annual retirement statement, and annual vacation notification letter) to file a protest.[18]

The Board also decided that its ruling would apply to Bale's individual grievance,[19] denied grievances related to individuals holding managerial positions at the director level and above as untimely,[20] and denied Mitchell's "grievances claiming that the Company incorrectly adjusted her vacation, pay and JA [jump seat] seniority dates . . . because the adjustments were made contemporaneously."[21] Finally, the Board retained jurisdiction of "all disputes arising based upon this decision including questions regarding remedy."[22]

On May 20, 2002, Continental and the IAMAW jointly issued a notice to all flight attendants stating that "Arbitrator Robert O. Harris has issued his decision in the matter of several seniority grievances. His decision has required a joint obligation of the parties to inform the flight attendants of the award."[23] The joint notice explained the terms of the award

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[18] See Decision of the Chairman and Award of the Board, Exhibit 1 in the Joint Appendix at pages 7-8.

[19] *Id.* at p. 8.

[20] *Id.*

[21] *Id.*

[22] *Id.* at p. 9.

[23] Exhibit 66 in the Joint Appendix.

and warned that "all claims must be filed no later than June 17, 2002. Any request, claim or grievance filed after that date will be considered untimely and will not be processed. Copies of the decision are posted in the bulletin books for review or is available from your Union representative."[24] On the same day IAMAW District 142 also issued a separate notice that described the arbitration decision to "[a]ll Continental [f]light [a]ttendants."[25]

On or about October 14, 2002, the Board issued a second Decision and Award that resolved grievances submitted to it pursuant to the Decision and Award dated May 17, 2002.[26] This Decision and Award resolved grievance no. 07607 brought by Bale:

> The Grievant claims his pass, pay and vacation seniority dates were adjusted in October 2000. The Company's records show that the adjustments were actually made in September 1998, outside the time frame for claims that can be submitted under the Decision and Award.[27]

Plaintiffs ask the court to vacate and remand the Decision and Award, and to enjoin Continental from implementing it. (PR ¶ 12) Plaintiffs contend that the Decision and Award "fails to comply with the requirements of the . . . [Railway Labor Act] RLA, fails to conform or confine itself to matters within the scope of its jurisdiction, is based upon fraud or corruption and has denied

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[24] *Id.*

[25] Exhibit 67 in the Joint Appendix.

[26] Exhibit 2 in the Joint Appendix.

[27] *Id.* at pp. 2-3.

[p]laintiffs and others similarly situated due process of law." (PR ¶ 12)

II. Plaintiffs' Claims

In their Petition for Review (Docket Entry No. 1) plaintiffs assert claims for violation of the RLA and for violation of their right to due process guaranteed by the Fifth Amendment of the United States Constitution.

A. Railway Labor Act Claims

Plaintiffs assert two RLA claims: (1) the Decision and Award does not comply with the RLA (PR ¶¶ 84-90), and (2) the Decision and Award fails to conform or confine itself to matters within the scope of the board's jurisdiction (PR ¶¶ 91-94).

Citing *McNair v. United States Postal Service,* 768 F.2d 730, 735 (5th Cir. 1985) (per curiam), defendants argue that this action should be dismissed because "individual employees lack standing to seek judicial review of a Systems Board of Adjustment award when, as here, a Union as their exclusive bargaining representative has prosecuted the grievances on their behalf."[28] Citing *Acuff v. United Papermakers & Paperworkers, AFL-CIO,* 404 F.2d 169 (5th Cir. 1968), *cert. denied,* 89 S.Ct. 1466 (1969), and *Clark v. Hein-Werner Corp.,* 99 N.W.2d 132 (Wis. 1959), *cert. denied,* 80 S.Ct. 878 (1960), plaintiffs respond that defendants' argument is contradicted by cases that have recognized an individual's standing to challenge an arbitration

[28] Defendant Continental AirLines, Inc.'s Response to Plaintiffs' Petition for Review, Docket Entry No. 48, p. 13.

award when the interests of the individual employees differ from the interests of their union.[29]

1. Standing Under the RLA

In *McNair* the Fifth Circuit recognized that

> [w]hen a collective bargaining agreement establishes a mandatory, binding grievance procedure and gives the union the exclusive right to pursue claims on behalf of aggrieved employees, the results obtained by the union are normally conclusive of the employees' rights under the agreement.

McNair, 768 F.2d at 735 (citing *Hines v. Anchor Motor Freight, Inc.,* 96 S.Ct. 1048 (1976), and *Vaca v. Sipes,* 87 S.Ct. 903 (1967)). "This means, of course, that an aggrieved worker whose employment is governed by such an agreement normally lacks standing independently to initiate grievance procedures, to sue for breach of the collective bargaining agreement, or to attack in court the results of the grievance process." *Id.* (citing *Acuff*, 404 F.2d at 171). Nevertheless, the court also recognized that "[t]hese rules are not . . . without exception." *Id.* The court explained that

> if the union has breached its duty of fair representation, by arbitrarily refusing to pursue a claim through the grievance process or by doing so in a perfunctory or otherwise inadequate manner, an aggrieved employee is not foreclosed by the results of the grievance process. He may sue his employer or his union or both but, in order to recover,

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[29] Plaintiffs' Reply Brief in Support of Petition for Review, Docket Entry No. 54, fourth through seventh unnumbered pages.

> he must prove that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement.

Id. (citing *Vaca*, 87 S.Ct. at 903).

The cases plaintiffs cite similarly recognize that individual employees seeking to challenge an award made by a system board of adjustment at an arbitration, after the union – as their exclusive bargaining representative – has prosecuted the grievances on their behalf, must show both that the company breached the CBA and that the union breached its duty of fair representation. *See Acuff*, 404 F.2d at 171 (individual employees lacked ability to intervene in arbitration proceeding where union had not breached its duty of fair representation); *Clark*, 99 N.W.2d at 136-137 (applying fair representation test to decide whether individual employees were entitled to relief from arbitration award).

2. Fair Representation

(a) Plaintiffs Disavow Fair Representation Claim

The Fifth Circuit's opinions in *Acuff*, 404 F.2d at 169, and *McNair*, 768 F.2d at 730, recognize that individual employees lack standing to challenge arbitration awards made pursuant to a binding arbitration provision where, as here, the aggrieved employees were represented by their union unless the employees can show that the union breached its duty of fair representation. Plaintiffs do not dispute that the CBA at issue in this case contains a mandatory, binding arbitration provision, or that the IAMAW held the exclusive right to represent them at the

arbitration.[30] Moreover, plaintiffs expressly disavow any claim that the IAMAW breached its duty of fair representation:

> Plaintiffs assert no claims against IAMAW, and in particular, Plaintiffs do not assert any claim of breach of the duty of fair representation. Rather, IAMAW is joined here for the sole reason that as a party to the arbitration which resulted in the Decision and Award, it is a party needed for just adjudication under Rule 19(a), Fed. R. Civ. P.

(PR ¶ 7)[31] Nevertheless, citing *Clark*, 99 N.W.2d at 137-138, plaintiffs argue that they have standing to bring this action because "where the substantial interests of the representative are not necessarily or even probably the same as those he purports to represent, due process

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[30] See Section 20(B)(9) of the April 1, 2000-October 1, 2004, Agreement between Continental Airlines, Inc., and the IAMAW, Exhibit 3 in the Joint Appendix ("Decisions of the Board in all cases referred to it shall be final and binding upon the parties hereto and the parties must abide by that decision.").

[31] See IAMAW's Brief in Opposition, Docket Entry No. 47, p. 14 & n.3 (asserting that any duty-of-fair-representation claim would be time barred by the six-month statute of limitations applicable to such claims). *See Wood v. Houston Belt & Terminal Ry.*, 958 F .2d 95, 97 (5th Cir. 1992) (six-month limitation period applies to hybrid actions brought by individual employees against their employers involving interpretation of a CBA, and against their unions for breach of the union's duty of fair representation), and *Smith v. Int'l Org. of Masters, Mates & Pilots*, 296 F.3d 380, 382-383 (5th Cir. 2002) (six-month limitations period applies to fair representation claim brought only against an employee's union).

militates vigorously against giving the decision effect upon them."[32]

(b) Differing Interests

Plaintiffs contend that "while IAM[AW] may assert that it is not interested in having the award set aside, IAM[AW] brief p. 15, [p]laintiffs, whose interests are different, have standing to seek review of that award."[33] Plaintiffs explain that "[p]resumably, the Union does not want the award set aside based upon the prospective relief it obtained, IAM[AW] brief p. 15, . . . [but that] despite its assertion of success, it was highly unsuccessful in restoring [their] . . . selectively and improperly adjusted seniority."[34]

In *Clark* the union's successful pursuit of its position resulted in the demotion of several employees. The Supreme Court of Wisconsin held that the arbitration award should not be binding upon adversely affected employees whose interests were diametrically opposed to the position espoused by the union where those employees were not given notice of the arbitration hearing. The Court explained that

> where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows as a matter of law that there has

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[32] Plaintiffs' Reply Brief in Support of Petition for Review, Docket Entry No. 54, fourth through seventh unnumbered pages, fifth-sixth unnumbered pages.

[33] *Id.* at sixth unnumbered page.

[34] *Id.* at n.6.

> been no fair representation of the other group . . . even . . . though, in choosing the cause of which group to espouse, the union acts completely objectively and with the best motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation.

99 N.W.2d at 137. The Court reasoned that even though the employer's position at arbitration was identical to the plaintiffs' position, "the plaintiffs were entitled to notice of the hearing, and an opportunity to intervene, as a matter of sound labor policy." *Id.* at 138. Since, as explained below, *Clark* is no longer good law on the duty of fair representation, and since the plaintiffs in this case either participated in the arbitration (Mitchell and Bale) or failed to file a grievance (Boorstein), the court is not persuaded that *Clark* supports plaintiffs' application for relief from the arbitration award. *See Gray v. Marinette County,* 546 N.W.2d 553, 560 (Wis. Ct. App. 1996), and *Miller Brewing Co. v. Brewery Workers Local Union No. 9,* 562 F.Supp. 1368, 1373 (E.D. Wis. 1983), *aff'd in part and rev'd in part on other grounds,* 739 F.2d 1159 (7th Cir. 1984), *cert. denied,* 105 S.Ct. 912 (1985).

In *Miller Brewing* the court declared that "Clark is not good law." 562 F.Supp. at 1373. The court explained that *Clark* was decided seven years before the United States Supreme Court announced the current standard for evaluating the union's execution of its duty in *Vaca v. Sipes,* in which the Court held that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* (citing *Vaca,* 87 S.Ct. at 916). In *Gray* the court rejected *Clark* as having been "decided in 1959, while the law on

fair representation was 'still in a state of flux.'" 546 N.W.2d at 560. The court explained that the Supreme Court's decision in *Humphrey v. Moore,* 84 S.Ct. 363 (1964), extinguished the rationale underlying the *Clark* decision. 546 N.W.2d at 560. In *Humphrey* the Supreme Court held that a union does not breach its duty of fair representation where it takes a "good faith position contrary to that of some individuals whom it represents [] or in supporting the position of one group of employees against that of another." 84 S.Ct. at 371. Reasoning that "[c]onflict between employees represented by the same union is a recurring fact," and that gagging the union would weaken the collective bargaining and grievance process, the Court held that unions must be free to take a position on significant disputes and should not be neutralized when the issue is between two sets of employees. *Id.* at 371-372.

Since *Clark* is no longer recognized as good law, the court is not persuaded that it supports the plaintiffs' claim for relief in this case. *See Miller Brewing,* 562 F.Supp. at 1373 ("Clark is not good law"). *See also Gray,* 546 N.W.2d at 560 (explaining that *Humphrey,* 84 S.Ct. at 363, contradicts any suggestion in *Clark* that when a union chooses to represent a union member whose interests are "diametrically opposed" to those of another member, the union has breached its duty of fair representation to the second member).

(c) Fifth Circuit Precedent

The law in this circuit has long been that individual employees may not seek to vacate an arbitration award

against the interests of its collective bargaining representative. *See Acuff,* 404 F.2d at 171-172. In *Acuff* the arbitrator denied the grievances of a number of terminated employees and reinstated others without back pay. Some of the employees moved to vacate the award. The district court denied the motion, and the court of appeals affirmed holding that unless the union breached its statutory duty of fair representation the employees did not have the right to override the interests of the group as a whole by seeking to set aside the awards. *Id.* Asserting that "the interests of particular individuals are subordinated to the interests of the group," the Fifth Circuit reasoned that "[i]t would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration state at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned." *Id.*

(1) Mitchell and Bale

Since Mitchell and Bale each filed grievances alleging that Continental had violated the terms of the CBA, and each granted the IAMAW "full power of attorney, to represent [them] in all stages of the [g]rievance [p]rocedure in the presenting and settling of [their] grievance[s],"[35] and since neither Mitchell nor Bale alleges that the IAMAW breached its duty of fair representation, the court concludes that Mitchell and Bale are bound to abide by the

[35] See Exhibit 5 (grievance no. 06082), Exhibit 8 (grievance no. 05446), and Exhibit 20 (grievance no. 06540) in the Joint Appendix.

decision of the Board. *See Acuff,* 404 F.2d at 171-172, and *McNair,* 768 F.2d at 735.

(2) Boorstein

Although, unlike Mitchell and Bale, Boorstein never filed a grievance alleging that Continental had violated the terms of the CBA and did not receive individual notice of the arbitration, the court concludes that she, too, is bound to abide by the decision of the Board because she is a member of the same collective bargaining unit as Mitchell and Bale and, like them, was represented at the arbitration by the IAMAW. Plaintiffs cite *Steward v. Mann,* 351 F.3d 1338, 1344-1345 (11th Cir. 2003), as a case in which a group of pilots who had not received notice of a pending arbitration successfully brought suit to set aside the resulting award.

Steward involved the issue of whether the statutory notice provision contained in 45 U.S.C. § 153 First (j) applied to proceedings before an airline board of adjustment. 351 F.3d at 1344-1345. The statutory notice provision requires an adjustment board to "give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them." 45 U.S.C. § 153 First (j). An employee is "involved" for purposes of § 153 First (j) if she would be adversely affected by the board's decision. *Id.* at 1345 (citing *Estes v. Union Terminal Co.,* 89 F.2d 768, 770 (5th Cir. 1937)). After holding that the due notice requirement of § 153 First (j) applies to airline boards of adjustment, the court addressed the specific issue before it: whether a group of individual pilots who were directly and adversely affected by the arbitration award were entitled to notice of the

arbitration hearing. *Id.* at 1345-1346. The court distinguished the facts before it from the typical case:

> [t]he Supreme Court has said that due notice is a flexible standard which takes into account the realities of the relationships between the employer, the union, and the employee. *See Elgin, J. & E. Ry. Co. v. Burley,* 66 S.Ct. 721, 723 & n.9 (1946). In the usual case, the union represents the employee before the board. *Id.* at 723; *Estes v. Union Terminal Co.,* 89 F.2d 768, 769-771 (5th Cir. 1937). Thus, in the usual case, when the board gives the union, rather than the employee, notice of the hearing, courts will not automatically set aside the board's award for failure to give due notice to the employee . . . This, however, is the unusual case in which the union does not represent the involved employees before the board. We have said that, in these unusual cases, the board should personally notify the involved employees who are unrepresented.

Id. at 1346. Unlike the "unusual" case presented in *Steward* where the aggrieved employees were not represented by the union, this case is the "usual case" because Boorstein, like Mitchell and Bale, was (and is) represented by the IAMAW.

Notice to the union constitutes adequate notice to employees like Boorstein who have not filed an individual grievance. *Bhd. of Ry., Airline & S.S. Clerks v. St. Louis Southwestern Ry.,* 676 F.2d 132 (5th Cir. 1982).

> The Board is obligated to notify an employee (or his representative) of any proceeding that may result in that employee's losing his position. This requirement should not prove burdensome in most instances, since a letter to one or two union

> representatives normally will ensure that all 'involved' parties are apprised of the dispute.

Id. at 135-136. Since the IAMAW had notice of the arbitration and represented the grievants at the arbitration, the court concludes that Boorstein and other members of plaintiffs' collective bargaining unit who never filed a grievance lack standing to challenge the resulting award without showing that the IAMAW breached its duty of fair representation. *See Acuff,* 404 F.2d at 169-171, and *McNair,* 768 F.2d at 735.

3. Conclusions

Grievances of five individual flight attendants that involved adjustments of non-competitive seniority for vacation time, pass and jump seat riding, and/or company seniority, all of which were made substantially after occurrence of the events that occasioned the adjustments, were brought together for binding arbitration at which the grievants were all represented by the IAMAW. The court concludes that Mitchell and Bale, two of the five individual grievants, lack standing to challenge the arbitration award because they have not alleged that the IAMAW breached its duty of fair representation. The court concludes that Boorstein, a flight attendant who belongs to the same collective bargaining unit as Mitchell and Bale but who, unlike Mitchell and Bale, never filed a grievance, also lacks standing to challenge the arbitration award because, like Mitchell and Bale, she has not alleged that the IAMAW breached its duty of fair representation. Accordingly, the court concludes that the RLA claims plaintiffs have asserted in their PR should be dismissed for lack of subject matter jurisdiction. *See McNair,* 768 F.2d at 737 (determination that plaintiffs lack standing to

sue robs the court of subject matter jurisdiction). Since dismissals based on the court's determination that it lacks subject matter jurisdiction are not dismissals on the merits, plaintiffs' RLA claims will be dismissed without prejudice. *See Air Line Pilots Association,* 567 F.Supp. at 72-74 (refusal to exercise jurisdiction establishes conclusive effect only on issue of federal jurisdiction).

B. Fifth Amendment Claims

Plaintiffs allege that the Board denied their fundamental right to due process of law guaranteed by the Fifth Amendment to the United States Constitution. (PR ¶¶ 95-97) Plaintiffs' allegations are that

> 96. By denying [p]laintiffs Mitchell and Bale due notice that they would be required to represent themselves at the [a]rbitration hearing and by failing to take any steps to insure that they would not be made to endure trial by ambush, the Chairman and the Board deprived [p]laintiffs Mitchell and Bale of due process of law under the Fifth Amendment to the Constitution of the United States.
>
> 97. By denying [p]laintiff Boorstein due notice that her rights would be determined at the [a]rbitration and by denying her the opportunity to be heard and to fully participate in a proceeding wherein valuable rights of hers were decided without her knowledge and participation, the Chairman and the Board deprived [p]laintiff Boorstein and those similarly situated to her of due process of law under the Fifth Amendment to the Constitution of the United States of America.

(PR ¶¶ 96-97) Plaintiffs argue that the Chairman and Board violated their fundamental right to due process "[i]n [f]ailing to [m]aintain a [r]ecord of the [h]earing at [w]hich the [c]laims of [p]laintiffs Mitchell and Bale [w]ere [h]eard,"[36] and "in [f]ailing to [p]rovide [n]otice of the [h]earing to [p]laintiff Boorstein and [o]ther [s]imilarly [s]ituated [f]light [a]ttendants, the [a]djustment [b]oard [v]iolated [f]undamental [d]ue [p]rocess [p]rinciples of [n]otice and the [r]ight to be [h]eard [w]hen [i]t [i]ssued [i]ts [a]ward [i]mpacting Boorstein's [s]eniority and the [s]eniority of [a]ll [f]light [a]ttendants."[37]

Continental contends that this issue was put to rest by the Supreme Court in *Union Pacific Railroad v. Sheehan,* 99 S.Ct. 399 (1978) (per curiam), in which the Court held that

> [j]udicial review of Adjustment Board orders is limited to three specific categories: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption . . . Only upon one or more of these bases may a court set aside an order of the Adjustment Board.

Id. at 402. Despite this language some courts, including the Fifth Circuit, have held that a due process challenge may constitute an independent ground for judicial review of an arbitration award. *See Atchison, Topeka and Santa Fe Ry. Co. v. United Transportation Union,* 175 F.3d 355,

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[36] Plaintiffs' Brief in Support of Petition for Review, Docket Entry No. 43, p. 13.

[37] *Id.* at p. 18.

357 (5th Cir. 1999) (this circuit "has recognized a fourth basis for setting aside an award, in cases where the award failed to meet the requirements of due process") (*citing Brotherhood of Locomotive Engineers v. St. Louis Southwestern Railway Co.*, 757 F.2d 656, 660-661 (5th Cir. 1985)). *See also Hayes v. Western Weighing and Inspection Bureau,* 838 F.2d 1434, 1436 (5th Cir. 1988) (noting that later decisions interpreting Sheehan "have cabined the reach of the due process challenge"). Plaintiffs predicate their due process claims on the fact that the Board did not maintain a record of the proceedings before it, and the fact that Boorstein and other flight attendants like her who never filed a grievance did not receive notice of the arbitration or an opportunity to be heard at the arbitration.

1. Failure to Maintain a Record

Since the court has already concluded that plaintiffs lack standing to challenge the arbitration award under the RLA, the court concludes that the Board's failure to maintain a record cannot have violated the plaintiffs' rights to due process because even if there were a record to review the court lacks jurisdiction to set aside the Board's decision based on its review of that record. *See Cusak v. Trans-Global Solutions, Inc.*, 222 F.Supp.2d 834, 843 (S.D. Tex. 2002) (characterizing lack of a complete record from arbitration proceeding as "irrelevant" where court was without power to set aside decision of the arbitrators).

2. Lack of Notice to Boorstein and Others Similarly Situated

Citing *Mullane v. Central Hanover Bank & Trust Co.*, 70 S.Ct. 652, 657 (1950), plaintiffs argue that Boorstein as

well as all other similarly situated flight attendants who never filed a grievance based on adjustments made to their non-competitive seniority were denied adequate notice of the pendency of the arbitration and an opportunity to present their claims regarding their seniority rights to the arbitral Board.[38] In *Mullane* the Court stated that

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. Citing *Elmore v. Chicago & Illinois Midland Railway Co.*, 782 F.2d 94, 96-97 (7th Cir. 1986), plaintiffs assert that their "vested seniority rights are without question 'property' within the meaning of the due process clause of the Fifth Amendment," and citing *Primakow v. Railway Express Agency, Inc.*, 56 F.Supp. 413, 416 (E.D. Wis. 1943), plaintiffs argue that notice to the IAMAW was not notice to them.[39]

Defendants argue that plaintiffs' non-competitive seniority should not be deemed a constitutionally protected property interest sufficient to trigger due process protections of the Fifth Amendment, and that even if it is, it should not be used to expand the notice and hearing rights contained in the RLA.

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[38] *Id.* at pp. 18-19.

[39] *Id.* at p. 19.

Assuming without deciding that plaintiffs possess a protected property interest in non-competitive seniority, the court concludes that plaintiffs have failed to allege facts sufficient to state a claim for violation of their Fifth Amendment rights to due process because in this circuit notice to the union constitutes notice to the employee. *See St. Louis Southwestern Ry.,* 676 F.2d at 136 ("the Board is obligated to notify an employee (or his representative) of any proceeding that may result in that employee's losing his position. (This requirement should not prove burdensome in most instances, since a letter to one or two union representatives normally will ensure that all 'involved' parties are apprised of the dispute"). The holding in *Primakow,* 56 F.Supp. at 413, cited by the plaintiffs, is not to the contrary.

In *Primakow* the plaintiff-employee claimed a seniority status superior to that of another employee, Ella Gregg, on whose behalf the union filed a grievance. At the ensuing arbitration proceeding the union argued Gregg's cause, and the company argued the plaintiff's cause. Following an arbitration decision in Gregg's favor, the plaintiff contended that she was not bound by the decision because she was not a party to the controversy and had not received notice of the hearings before the arbitral board. The court addressed the issues of whether the plaintiff had due and timely notice of the hearings before the board, and whether by her conduct she had waived such notice. The court concluded that the plaintiff was entitled to notice of the hearings because it could not "be contended that the brotherhood was representing [her] in the controversy[, and] . . . was in fact vigorously contesting her claim and, in championing the cause of Mrs. Gregg, [was actually] . . . oppos[ing] the interests of the plaintiff."

Id. at 416. The court also concluded that since plaintiff had written letters to the company about the matter in controversy that she had not waived her right to notice of the arbitration. *Id.* Unlike the plaintiff in *Primakow* who had written to the company about the controversy before the arbitration took place, but was neither represented at the arbitration nor notified by her union that the arbitration would take place, Boorstein never filed a grievance or took any other steps to protect her non-competitive seniority before the arbitration took place. Nevertheless, Boorstein was represented by the IAMAW at the arbitration as a member of the grievants' collective bargaining unit.

Although *St. Louis Southwestern Ry.,* 676 F.2d at 136, and *Primakow,* 56 F.Supp. at 413, concerned the RLA's statutory notice requirement, the Board's notice to the IAMAW in satisfaction of the RLA's statutory notice requirement necessarily satisfies the Fifth Amendment's notice requirement. *See Locomotive Eng'rs v. St. Louis Southwest Ry.,* 757 F.2d 656 (5th Cir. 1985) (recognizing due process as ground for judicial review but rejecting constitutional claim that was based on the same reasoning as a rejected statutorily-based claim for judicial review).

3. Conclusion

The root requirement of procedural due process is that an individual be given notice and an opportunity to be heard before he or she is deprived of a property interest. *Mullane,* 70 S.Ct. at 657. Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge,* 96 S.Ct. 893, 902 (1976). Assuming without deciding that the CBA creates a protected property interest in non-competitive seniority the

court concludes that plaintiffs have failed to allege facts that state a claim for violation of their right to due process because the court's conclusion that they lack standing to challenge the arbitration award under the RLA makes the Board's failure to maintain a record irrelevant, and because notice to the IAMAW constituted notice to Boorstein and the other flight attendants who never filed a grievance concerning Continental's adjustments to their non-competitive seniority. Accordingly, the court concludes that the Fifth Amendment claims plaintiffs have asserted in their Petition for Review should be dismissed for failure to state a claim for which relief may be granted.

III. Conclusions and Order

For the reasons explained above, Plaintiffs' Petition for Review (Docket Entry No. 1) is **DENIED**, plaintiffs' RLA claims will be **DISMISSED without prejudice**, and plaintiff's claims for violation of their Fifth Amendment rights to due process will be **DISMISSED with prejudice**.

SIGNED at Houston, Texas, on this 5th day of August, 2005.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARILYN MITCHELL, KEVIN BALE, and SUSAN BOORSTEIN, Plaintiffs,	§	
v.	§	CIVIL ACTION NO. H-04-3470
CONTINENTAL AIRLINES, INC. and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Defendants.	§	

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order denying plaintiffs' petition for review, the claims that plaintiffs have alleged under the Railway Labor Act are **DISMISSED without prejudice**, and the claims that plaintiffs have alleged under the Fifth Amendment to the United States Constitution are **DISMISSED with prejudice.**

Costs will be taxed against plaintiffs.

This is a **FINAL JUDGMENT.**

SIGNED at Houston, Texas, on this 5th day of August, 2005.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

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In the Matter of Arbitration

between

INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 142

and

CONTINENTAL AIRLINES, INC.

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GRIEVANCE Nos. 04554 (Sonnichsen);
05473, 05446, and 06171 (Mitchell);
06050 (Bice); 06056 (Cruz);
06062, 06540, and 07236 (Bale); 06107 (Shaw)

DECISION OF THE CHAIRMAN
AND
AWARD OF THE BOARD

Appearances

For the Association
Robert S. Clayman
Guerrieri, Edmond & Clayman

For the Carrier
Jeffrey D. Wall, Esquire

System Board Members

From the Association
Jeff Oliver

From the Carrier
Cindy Seffair

Neutral Chairman
Robert O. Harris

Appointment

Under Title II of the Railway Labor Act, as amended, the parties entered into a collective bargaining agreement which provides in Section 19 for the establishment of a System Board of Adjustment. The present Board, consisting of Jeff Oliver, member appointed by the Association; Cindy Seffair, member appointed by Continental Airlines; and Robert O. Harris, chosen by the parties as the chairman and neutral member, was designated to hear and decide the issues involved in the instant case.

The arbitration hearing was held on February 5 and 6, 2002 in Washington, D.C., where the parties presented testimony, written evidence, and arguments to support their respective positions. An executive session of the Board also was held on February 6, 2002. Briefs were filed on March 21, 2002. The arbitration proceeding now is complete and the matter in dispute is ready for decision.

Facts

The five individual grievances, which have been brought together for decision, all involve adjustments to vacation, pass, or company seniority, and all of which were made substantially after the events occurred which occasioned the adjustment of seniority by the company. The individual situations were summarized by the IAM, as follows:

> Kevin Bale: From October 1991 through October 1992, Bale took a company offered leave of absence. The company stated that in January 1991 it began to make adjustments to pass seniority for such leaves. However, upon his return and for approximately seven years thereafter, the company

permitted Bale to use the seniority date on his ID card for pass-riding purposes, a date which was not adjusted to reflect his 1991 leave of absence.

Ann Bice: For approximately fifteen years, Bice used a vacation seniority date of 3/24/75. In March 2000, the company informed her that her seniority date was incorrect and was being adjusted to 5/19/77, a loss of 787 days of seniority. In January 2001, the company corrected its previous adjustment after further review and adjusted her seniority to 2/10/76, still a loss of 323 days of seniority. The revised adjustment reflected events which had occurred as early as June 1975 and as late as July 1984.

Rebecca Cruz: For approximately ten years, Cruz used a vacation seniority date of 6/11/75, until the company notified her that it was adjusting her date to 7/5/75, a loss of 24 days of seniority. After Cruz inquired about the adjustment, on December 1, 1999, the company reviewed its records and announced that her seniority would be further adjusted to 2/1/76, a total loss of 204 days of seniority. The revised adjustment reflected events which had occurred as early as May 1982 and as late as March 1989.

Marilyn Mitchell: In June 1995, the company adjusted her seniority date to 7/20/70. For over three years, Mitchell used this date. In September 1998, however, the company retroactively adjusted her seniority to 4/4/71, a loss of 258 days of seniority. The company based its adjustment on events which occurred as early as August 1991 and as late as June 1995.

> Arlene Sonnichsen: In August 1998, the Company made a timely, but partial, adjustment of her time on furlough from 1994 through 1997. Shortly thereafter she requested clarification regarding her seniority. As a result, in January 1999, the company made further adjustments to her seniority based on events which had occurred as early as August 1971 and including an adjustment for her entire time on furlough, resulting in a loss of 133 days of seniority.

The collective bargaining agreement requires a biannual posting of a System Seniority List for flight attendants for bidding seniority. There is no mention in the agreement for posting other types of seniority: pay seniority, vacation accrual seniority, jumpseat and pass-riding seniority and company service seniority. The agreement allows flight attendants 30 days within which to protest errors in the bidding seniority list after its posting; however, no posting or other regular listing of an individual's seniority for other purposes ever has been made.

The company has communicated the several non-competitive seniority dates in various ways. Pay seniority dates appear on pay stubs since at least the first collective bargaining agreement negotiated with the IAM; vacation seniority has been sent to flight attendants annually; jumpseat and pass-riding seniority has been made based on the date appearing on their company identification cards or JA entry in the SONIC computer system, although recently, if a ticket was requested on line, a different, adjusted date might be used, of which the flight attendant may never have been informed.

Testimony indicated that some adjustments were made when an individual flight attendant asked a question

regarding his or her seniority. Accordingly, in certain cases adjustments were made for some flight attendants, but not for others.

Issue in Dispute

Were the various adjustments which were made to flight attendant seniority proper, as in some cases they were made long after the events which caused the adjustments, and, if not, what is the appropriate remedy?

Contentions of the Parties

It is the contention of the union that the doctrine of estoppel bars the company from retroactively altering seniority dates to correct errors that the company has permitted to stand for long periods of time. It further contends that the doctrine of laches bars the company from belatedly asserting a right to adjust seniority. Finally, the union contends that the principles of disparate treatment prohibit the company from selectively adjusting seniority rights. As a remedy, the union suggests that: (1) the company be prohibited from making any adjustments to grievants' seniority to reflect an event that occurred more than one year it the past; (2) that the company be required to make grievants whole for the vacation and other benefits lost as a result of the company's adjustments to their seniority; (3) that, in the future, the company may only look back for one year in making adjustments to seniority, and that flight attendants have one year in which to challenge such seniority adjustments; and (4) that for a sixty (60) day period following the issuance of the decision in this case, flight attendants may notify the company that it retroactively adjusted their

seniority to reflect an event that occurred more than one year ago and that the company shall rescind such adjustments and make the affected flight attendants whole for the vacation and other benefits lost as a result of the company's adjustments to their seniority.

The carrier takes the position that the company should not be held to the same time limits of thirty (30) days which are contained in the collective bargaining agreement because nothing in that agreement or the past practice of the parties indicates any intent to place such restrictions on the company's ability to administer seniority adjustments. It further contends that application of a purely procedural time limit rule to the administration of seniority adjustments would adversely impact the substance or merits of the flight attendant seniority systems. Permitting or denying otherwise correct adjustments based solely on compliance with an arbitrary time limit would, as a practical matter, result in unfair and inequitable adjustments among similarly-situated members of the bargaining unit. It maintains that, as a practical matter, the company cannot be expected to administer its various seniority systems by executing all adjustments within 30 days of each event giving rise to an adjustment. The company notes that "Underlying time limits on filing of claims is the interest in discouraging 'sleeping an one's rights' or appearing to acquiesce to a given policy or practice. In contrast, there is no reason or principle justifying rejection, based merely on the passage of time, of accurate seniority adjustments." The company suggests that if the Board concludes that the timing of adjustments is subject to some rule of reasonableness, a time limit far different from the 30-day period for filing protests and grievances must be used. It suggests that it should be no

less than one calendar year after conclusion of the event giving rise to the adjustment (such as the flight attendant returning to active duty), or after the regular publication of the seniority date (such as for vacation seniority). The company also believes that if it is limited to going back one year, flight attendants likewise should be limited in seeking revisions of established seniority, or adjustments made to seniority, more than one year prior to the date of the adjustment. The company believes that limits must apply equally whether the adjustment would be in the flight attendant's favor or not.

Discussion

Between 1979 and the present, Continental has undergone four mergers, two bankruptcy proceedings, and three strikes. The parties to this dispute are far different from those who had set company seniority policy during much of this period. It is clear from the parties positions, stated above, that there is a genuine desire to equitably resolve the problem presented by the various grievances before the Board. The doctrines cited by the union are concerned with equity and involve the basic principle that employees of the same class should be treated equally. The record before this Board shows that in prior years and prior administrations, a careful record of when an individual returned to work from a leave of absence for purposes of his or her seniority was not always maintained. Adjustment was made for periods of inactivity taken by some individuals when they returned to work, but not for others. Because the records from prior years may not be sufficiently accurate to resolve all disputes which may arise, it will be necessary to establish a retrospective rule which is different from that pertaining to the future.

However, this Board does not have jurisdiction to go back further than the beginning of the collective bargaining agreement between the Company and the IAM at the time the grievances being heard were filed. Thus the IAM claim regarding adjustments made for maternity leave taken under collective bargaining agreements prior to 1983 must be dismissed. Furthermore, such claims were previously settled in 1989 and gave flight attendants the right to file claims at that time.

Furthermore, this Board cannot examine all of the individual employment records of the flight attendants employed by Continental, and there is no way to remedy errors which have caused individuals to lose jumpseat and pass-riding seniority. Accordingly, for retroactive adjustments that occurred within the last two years,[1] flight attendants may protest such adjustments in their seniority dates which occurred more than a year after the event which triggered the adjustment. They may do so within 30 days of the date on which this award is rendered, and the parties shall have the joint obligation of informing all flight attendants of this decision. Flight attendants who are on leaves of absence shall have 30 days after their return to duty to file such protests. In the event a flight attendant files such a protest, the company may look at any event which concluded during the two-year period and make adjustments to include any non-duty time which ended during that two-year period. For the future, the company shall have a period of one year from the date on which a flight attendant returns to duty to adjust his or her seniority date. Likewise, flight attendants will be

[1] The two-year period shall begin on the date of the award.

limited in challenging adjustments made to seniority, more than one year prior to the date of the adjustment. Within that time parameter, individual flight attendants shall have 30 days from the date on which they first were notified by the Company (e.g. System Seniority posting, pay register, annual retirement statement, and annual vacation notification letter) to file a protest.

In resolving the individual grievances which have been filed, the Board finds that the grievance of Sue Shaw is denied because of a failure to prove her claim as she did not testify; as for Ann Bice, Arlene Sonnichsen, Kevin Bale[2], and Rebecca Cruz the rules as previously stated shall be applied to their individual situations. The grievances of Marilyn Mitchell are decided as follows: the grievances claiming that the Company incorrectly adjusted her vacation, pay and JA seniority dates are denied because the adjustments were made contemporaneously and in order to retain seniority one must be on the list of Company employees and to accrue seniority one must be in the active service of the Company and be receiving pay for such service. Her grievance contesting the Company's adjustment of her Company service date is denied, as among other things, Company service dates determine retirement and benefits and, as it relates to service credit, are not governed by the terms of the collective bargaining agreement but rather by the rules of the Continental Airlines Retirement Program.

Grievances claiming that individuals holding Director level and above positions and individuals placed on the

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[2] Mr. Bale also claimed disparate treatment; however this claim need not be decided in view of the award in this case.

System Seniority List with dates that do not coincide with the date that they were placed on flight attendant payroll and the individual working as inflight liaison to dining services should be removed from the System Seniority List are denied as untimely and because of Letter of Agreement 22.

Award

The grievance is sustained in accordance with the Discussion above. In the event there is a protest which cannot be resolved it may be submitted to the System Board of Adjustment in accordance with the grievance procedure under Section 19. This Board will retain jurisdiction of all disputes arising based upon this decision including questions regarding remedy.

/s/ Robert O. Harris
Robert O. Harris
Chairman

/s/ Cindy Seffair
Cindy Seffair
Carrier Member
(Concur) (Dissent)
In Part In Part

/s/ Jeffrey S. Oliver
Jeff Oliver
Union Member
(Concur) (Dissent)
In Part In Part

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In the Matter of Arbitration *
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between *
*
INTERNATIONAL ASSOCIATION * OF MACHINISTS DISTRICT 142 *
*
and *
*
CONTINENTAL AIRLINES, INC. *
*

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GRIEVANCE Nos. 04554 (Sonnichsen), 05473, 05446, and 06171 (Mitchell); 06050 (Bice); 06056 (Cruz); 06082, 06540, and 07236 (Bale); 06107 (Shaw); and General Grievance G-17 (IAM)

DECISION OF THE CHAIRMAN
AND AWARD OF THE BOARD

Appearances

For the Association
Robert S. Clayman
Guerrieri, Edmond & Clayman

For the Carrier
Jeffrey D. Wall, Esquire

System Board Members

From the Association
Jeff Oliver

From the Carrier
Cindy Seffair
Neutral Chairman
Robert O. Harris

The following grievances were submitted to the System Board of Adjustment for resolution pursuant to the Decision and Award dated May 17, 2002. The Board

retained jurisdiction under that Award to resolve all disputes arising from it, including questions of remedy and other seniority protests flied in conformance with the Decision and Award. The parties have submitted three cases addressed in the Decision and Award for the Boards consideration as to remedy. The Board finds as follows:

Grievance No. 04554 (Sonnichsen)

The Grievant's vacation seniority date is October 4, 1973. The Company shall pay her one weeks vacation pay at her rate of pay in effect in 1999.

Grievance No. 06050 (Bice)

The Grievant's vacation seniority date is March 24, 1975. The Company shall pay her one weeks vacation pay at her rate of pay in effect in 2001.

Grievance No. 06056 (Cruz)

The Grievant's vacation seniority date is July 5, 1975. The Company shall pay her one week's vacation pay at her rate of pay in effect in 2001.

Grievance No. 07607 (Bale)

The Grievant claims his pass, pay and vacation seniority dates were adjusted retroactively in October 2000. The Company's records show that the adjustments were actually made in September 1998, outside the time-frame for claims that can be submitted under the Decision and Award. The grievance is denied.

Eleven additional cases were submitted for the Board's consideration regarding adjustments in various seniority dates. Having reviewed the evidence and arguments of the parties, the Board rules as follows:

Grievance No. 07431 (Morales; Ryan)

The Grievants' pass boarding seniority dates were adjusted retroactively for leaves of absence taken more than one year before. In accordance with the principle set forth in the Decision and Award, such retroactive adjustment shall be rescinded, and their pass boarding seniority dates each shall be July 1, 1984. There shall be no change to their current Company service seniority dates.[1]

Grievance No. 07432 (Piazza)

The Grievant claims her pay seniority was adjusted in September 2000 for leaves taken in 1997 and 1998. The Company's payroll records demonstrate that her pay, vacation and Company service seniorities were adjusted in a timely fashion upon her return from leave in both 1997 and 1998. She was not adjusted retroactively in 2000. The grievance is denied.

[1] As noted in the May 17 Decision and Award, protests concerning adjustments in Company service dates are outside this Board's purview. Company service dates determine retirement and benefits and, as it relates to service credit, are not governed by the terms of the collective bargaining agreement but rather by the rules of the Continental Airlines Retirement Program.

Grievance No. 07433 (Heffernan)

The Grievant claims that retroactive adjustments were made to her Company service and pass boarding seniority date. The Company's records show that a clerical "keypunch" error changed her original hire date of November 1, 1987 to February 24, 1987. The date of hire and pass seniority dates were then retroactively adjusted in 2001 to account for leaves of absence taken more than one year before. The retroactive adjustment in pass seniority shall be rescinded, but the correction and adjustment of her Company service date shall stand. Her pass seniority date shall be November 1, 1987 and her Company service seniority date shall be April 29, 1988.

Grievance No. 07434 (Mysel)

The Grievant's pay and pass boarding seniority dates were adjusted retroactively in July 2000 for leaves taken in 1992. Her pay seniority shall be returned to April 6, 1993, and her pass seniority shall be returned to September 5, 1992.

Grievance No. 07435 (Wintenburg)

The Grievant's vacation, pay and pass seniority were adjusted retroactively in November 2000. Those adjustments shall be rescinded. Her pay seniority date shall be August 13, 1969; her vacation seniority shall be December 29, 1973; and her pass seniority shall be October 6, 1967.

Grievance No. 07436 (Endersen)

The Grievant claims her seniority was adjusted by three years, sometime between 1995 and 2000. She provided no

documentation to substantiate that her claim falls within the parameters provided in the Decision and Award. The grievance is denied.

Grievance No. 07608 (Estelle)

The Grievant disputes various adjustments to her seniority dates. However, she makes no specific claim of retroactive adjustment to a particular seniority date that would fall within the scope of the Decision and Award, nor did she provide any documentation to substantiate her claims. The grievance is denied.

Grievance No. 00395 (Scully)

The Grievant's Company service, pay and pass seniority were adjusted in August 2000 for a leave taken in 1995. The adjustments to pay and pass seniority shall be rescinded. Her pay and pass seniority dates shall be January 3, 1993. There shall be no change to her current Company service date.

Grievance No. 00396 (Beech)

The Grievant's vacation and pay seniority were adjusted in 2000, pursuant to a 1993 Agreement reached in settlement of a grievance. The Company's records show that, but for one day, the Company timely and properly adjusted the Grievant's pay seniority. A similar adjustment to her vacation seniority (normally occurring automatically upon return from leave) did not occur due to the length of the Grievants absence (more than two and one-half years). Most importantly, the Grievant in this case expressly agreed that she would not accrue vacation and pay seniority for her period of inactivity. The Board finds

that the specific and express terms of the settlement agreement must take precedence over the general principle set forth in the Decision and Award. Accordingly, the grievance is denied.

Grievance No. 00397 (Valint)

The Grievant's pay and pass seniority were adjusted in November 2000 for a leave of absence taken prior to 1996. Those adjustments shall be rescinded. Her pay seniority shall be August 20, 1983, and her pass seniority shall be April 9, 1983.

The Board has also considered, in each of the cases discussed above, whether the Grievants are entitled to a monetary or other remedy. Based on the facts of each case, the Board finds such remedies are not warranted.

Finally, the Board finds it necessary to clarify one aspect of its Decision and Award. The Company is required to provide to flight attendants, through its customary and usual channels, their various seniority dates. Nothing in the Board's Decision and Award, however, requires the Company to re-calculate or provide a history of the adjustments made to any flight attendants seniority dates, nor is the Company required to research unsubstantiated claims of seniority adjustment. Flight attendants may review their seniority dates and personnel files upon request to their base management or human resources representative.

This Decision and Award is final. No further protests of seniority shall be considered, except as provided in the collective bargaining agreement.

/s/ Robert O. Harris
Robert O. Harris
Chairman

/s/ Cindy Seffair
Cindy Seffair
Carrier Member

/s/ Jeffrey S. Oliver
Jeff Oliver
Union Member

45 U.S.C.A. § 153

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided

* * *

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of

the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

U.S.C.A. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARILYN MITCHELL, KEVIN BALE, AND SUSAN BOORSTEIN,	§	
Plaintiffs,	§	**CIVIL ACTION NO.4:04-CV-03470**
v.	§	
CONTINENTAL AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	§	**JURY TRIAL DEMANDED**
Defendants.	§	

DECLARATION OF MARILYN MITCHELL ISLAVA

Pursuant to 28 U.S.C. §1746, Plaintiff Marilyn Mitchell Islava makes the following declaration:

1. My name is Marilyn Mitchell Islava. I am one of the Plaintiffs in the above referenced case.

2. The information contained in this declaration is true and correct and is based upon my personal knowledge of the matters contained herein.

3. I am currently employed as a flight attendant with Continental Airlines, Inc ("Continental"). I began my employment with Continental as a flight attendant on January 24, 1969 and began flying for Continental on February 25, 1969. As far as I was aware, February 25, 1969 was the date used by Continental not only for my bidding seniority date, but also for all other seniority related dates. During the 27 years between 1969 and 1996,

the February 25, 1969 date was the date used by Continental as my pass riding seniority date.

4. In 1996, my pass riding date, known as the JA entry, was changed by Continental without my knowledge. When I questioned why flight attendant with less seniority than I had were boarding a flight before me, I found out for the first time that my jump pass riding seniority had been retroactively adjusted for a company offered leave that I had taken years before.

5. Company offered leaves have been offered to Continental flight attendants since 1969. Company offered leaves are offered based upon seniority to alleviate the impact of overstaffing and base closings. The company offered leaves are advantageous to Continental because in times of overstaffing, the company offered leave encourages Continental's senior and therefore higher paid flight attendants to take unpaid leave resulting in fewer junior flight attendants being placed on furlough. Company offered leaves save Continental money in several ways. Continental's payroll expense is lowered by having lower paid flight attendants on duty. Continental does not have to pay the flight attendants who are on company offered leave and it does not have to pay furlough pay required by the collective bargaining agreement to the junior flight attendants who are able to work in place of the senior flight attendants who are on company offered leave.

6. In 1997 I discovered that my vacation seniority date and those of other flight attendants were different and less advantageous to me than those indicated in my previous records. To find out why this was so, I wrote to Continental's HR Department to ask about the new date that I was given.

7. On November 15, 1997 Teri Hoffer, a Continental employee, told me that she had adjusted my seniority date 2,217 days which resulted in my now having a seniority date of March 23, 1975 rather than my actual date of February 25, 1969. When I questioned the accuracy of this adjustment, Continental took another year from my vacation and pass riding seniority dates.

8. Because of Continental's unjustified retroactive adjustment of my vacation seniority, I received only 21 days of vacation while other flight attendants who had taken the exact same company offered leaves that I took were given 42 days of vacation.

9. On January 13, 1998, after I again questioned the adjustment to my seniority date, Terry Kushner, a Continental supervisor, recalculated my seniority. This time my seniority date was said to be April 9, 1974, an adjustment of 1,866 days.

10. I again inquired as to how this date was determined. On September 9, 1998 I was told by Mary Ellen Holmes, from Continental's Human Relations Department, that my seniority date was June 25, 1975, a loss of 2,308 days.

11. I was astonished that within a short period of time, 3 members of the Continental HR Department had calculated three different seniority dates for me. However, none of the dates was calculated correctly under the terms of the work orders and collective bargaining agreements that were applicable to my employment.

12. When I was unable to have my seniority dealt with properly by Continental, I contacted my union, the International Association of Machinists and Aerospace

Workers ("IAM") and was told by Sheila Hammonds, the President of Local 2339, and by the Chairman of the Houston grievance committee, Mark Henry, that IAM was working on these issues and that Continental's actions adversely affected a large number of the flight attendants.

13. In 1999, I filled out paperwork regarding the seniority issues that was sent to the Kansas City, MO office of IAM District 142. When I inquired about the status of the seniority issues, I was falsely told that the seniority issue had gone to Arbitration and had been lost.

14. Because my seniority records were not correct, I met with Stephanie Francis in Continental's HR office on April 13, 2000. She advised me to go meet with Mary Ellen Holmes in Continental's main HR office and to meet with Continental's Director of In-Flight Administration, Wendi Femia. I thereafter met with Ms. Holmes and Ms. Femia and showed them records demonstrating that other flight attendants who were under the same collective bargaining agreement had been adjusted differently for the same leaves.

15. Ms. Femia told me that Continental was aware that everyone had not been similarly adjusted. She offered to adjust anyone that I suggested should be adjusted, but said that Continental did not have the time or manpower to go through all the records of thousands of flight attendants.

16. After this meeting I again contacted the IAM to complain about the total breakdown of the non-competitive seniority system at Continental. I was again told that nothing could he done because there had been an Arbitration that had been lost. I asked to see the Arbitration

decision, however, no one could show it to me because no Arbitration had been conducted.

17. After trying to do so for some period of time, I was finally permitted to file a grievance on May 24, 2000 complaining about the unfair seniority adjustments.

18. On July 12, 2000 a step one hearing was held on my grievance and the grievance was denied. A step two hearing was held without my being present. The decision-maker for Continental in this step two hearing was Cindy Seffair, who later served on the System Board of Adjustment, in essence reviewing her own decision to deny my grievance.

19. Shortly after the step one hearing of my grievance, on August 8, 2000 I was advised by Continental that my vacation seniority had again been adversely adjusted another 170 days although I had not taken any leave that would justify this loss of my seniority.

20. The Arbitration date for my grievance was originally scheduled to take place on April 10, 2001 before the System Board of Adjustment chaired by Robert O. Harris. However, I was told that Mr. Harris had a scheduling conflict and the date was rescheduled. Although the collective bargaining agreement in effect at the time stated that if the neutral selected to chair an arbitration could not hear the matter within 45 days, a new neutral chairman could be selected, Continental and the Union did not do so. On March 22, 2001, the Arbitration date was reset to July 17, 2001. On April 16, 2001 the date for the Arbitration was again reset to February 5-6, 2002. Thus, rather than choose a different neutral chair for the Arbitration, the Arbitration was postponed almost 10 months from its original date. While I do not recall when Mr.

Harris first began serving as a "Neutral" on the Systems Board of Adjustment dealing with seniority issues for Continental flight attendants. I do know that he has served in this capacity at least since the 1980s. No other person has served as a "Neutral" on a Systems Board of Adjustment dealing with flight attendant's seniority other than Mr. Harris since that time.

21. Prior to the date initially scheduled for the Arbitration Kevin Bale and I met with Robert Clayman, the lawyer who represented the IAM at the Arbitration and who was to present our grievances to the Board. Mr. Clayman told me that he had to do what was best for everyone in the Union as opposed to what might be best for me. I therefore asked him if I could hire my own lawyer to represent me at the Arbitration. Mr. Clayman told me that the IAM would set my grievance aside and proceed without me if I attempted to bring in outside counsel.

22. Nonetheless, on April 12, 2001, I received a letter from William O'Driscoll, the President-Directing General Chairperson of IAM District Lodge 142, telling me that the union would be handling the Arbitration, but that if I signed a waiver, I could have an attorney at the hearing to present any additional evidence that was relevant to and consistent with the IAM. In that letter, however, Mr. O'Driscoll assured me that the IAM intended to arbitrate my grievance and the other individual grievances and urged me to work together with the union.

23. Kevin Bale and I then met with Tom Kane, an attorney whom we retained to advise us regarding the Arbitration. Mr. Kane attempted to meet with the counsel for the IAM and to coordinate the presentation of evidence at the hearing. However, these efforts proved fruitless. Mr.

Clayman rebuffed the efforts of our attorney to assist us and sent Mr. Kane a letter in response to his efforts stating that the IAM "will not concede to these individuals its exclusive right to determine how to enforce a collective bargaining agreement or how to process contractual grievances." As a result neither Kevin Bale nor I or any of the other persons whose grievances were heard by the Board were represented by anyone other than the IAM's attorney, Mr. Clayman.

24. Two days prior to the February 5-6, 2002 hearing before the Board, I was told by Brent Thompson, an officer of the IAM, that I would probably be called as a witness. I had assembled many, relevant documents concerning the incorrect and unjustified retroactive adjustment of my and other flight attendants' seniority as well as relevant information concerning the inaccuracy of Continental's record keeping and inclusion of people on the seniority rosters who should not have been entitled to the seniority they were given. Although I had repeatedly over a period of time attempted on my own and through Mr. Kane to have the IAM officials and counsel review this documentation, they were not interested in doing so.

25. I attended the February 5-6, 2002 Arbitration in Washington. I was present for both the first and second days of the proceedings. I observed Mr. Clayman call witnesses including Kevin Bale who were asked questions by Mr. Clayman and then asked questions by Jeffrey Wall, counsel for Continental. Kevin Bale was called as a witness and testified by phone. I was surprised when, after asking Mr. Bale some questions relevant to the grievances, Mr. Clayman advised the Board that Mr. Bale would testify on his own regarding certain matters that the IAM did not endorse. Mr. Bale seemed quite surprised himself.

It was obvious to all present that due to the method by which the IAM introduced this testimony of Mr. Bale that the testimony would not be given any credence by the Board.

26. I was not called to testify until the very end of the hearing on the second day of the Arbitration. Just prior to my testimony, the proceeding was recessed for a ten minute break. During that break, without any prior warning, I was advised by Mr. Clayman that the IAM would not represent me and that I would have to present my entire grievance by myself. I have no legal training and was given no more than 10 minutes notice that I would be representing myself in these proceedings.

27. When the proceedings reconvened, I was visibly shaking and had tears in my eyes. I was extremely upset and advised Mr. Harris and the two other members of the Board that I had just been told I would have to represent myself. I explained that I was not a lawyer, that I had been a flight attendant all my many working years, and that I really did not know how to proceed. Nonetheless, no member of the panel including Mr. Harris suggested that the hearing be recessed or demanded that Mr. Clayman assist me in the presentation. No steps were taken to protect me from what was obviously a very unjust and unfair situation. Mr. Harris did permit Mr. Wall, Continental's attorney, to cross examine me although I was obviously not afforded the protection of having an attorney on my side to object to the questions I was being asked. I was in no way afforded an opportunity to fully and fairly participate in the proceedings in a meaningful way nor to have my voice heard with regard to my seniority rights.

28. At the February 5-6 Arbitration, Mr. Harris was very careful to make sure that the entire proceeding was tape recorded. He also accepted documentary evidence in the case. At no time during the proceedings was I led to believe that there would not be an accurate taped record of the proceedings and a record of the documentary evidence offered by the parties. I was stunned to learn after the filing of my case in federal court that Mr. Harris, apparently with the consent of Continental and the IAM had deliberately destroyed the carefully recorded tapes of the proceedings as well as the documentary evidence submitted to the Board.

29. Although the Decision and Award of the Board correctly states that adjustments were made for some flight attendants, but not for others, the remedy utilized by the Board for this corruption of the flight attendants' seniority did not remedy the problem at all. Rather, the purported relief granted by the Board arbitrarily locks most flight attendants into seniority positions that are not justified and that adversely places them on the seniority rosters in ways that deprive them of pay, vacation days, jump seat and pass riding rights, longevity pins and recognition for years of service and eligibility for retirement. Contrary to the findings of the Board, these rights can be compensated by correcting the seniority dates of all flight attendants and by compensating with money or other benefits those flight attendants who have suffered due to the inaccurate or unjustified retroactive adjustments to their seniority.

30. I personally have been deprived of almost 3 years of seniority to which I am entitled. Contrary to the Board's findings, I was retroactively penalized for having taken company offered leaves of absence which under the collective

bargaining agreements and flight attendant work rules in effect at the time did not call for these leaves to result in the amount of seniority loss to which I was arbitrarily subjected by members of Continental's HR Department. There is certainly no justification for the continued adverse adjustment of my seniority in retaliation for my inquiring or objecting to the inaccurate calculation of my seniority dates.

I declare under penalty of perjury that the foregoing is true and correct.

May 10th, 2005.

/s/ Marilyn Mitchell Islava
Marilyn Mitchell Islava

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARILYN MITCHELL, KEVIN BALE, AND SUSAN BOORSTEIN,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 4:04-CV-03470**
CONTINENTAL AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	§	**JURY TRIAL DEMANDED**
Defendants.	§	

DECLARATION OF KEVIN BALE

Pursuant to 28 U.S.C. § 1746, Kevin Bale makes the following declaration:

1. I was hired by Continental Airlines, Inc. ("Continental") as a flight attendant on July 1, 1987. I flew out of Continental's base in Seattle, Washington from 1987 until Continental closed the base in 1991. At that time, I accepted a company offered leave. Continental did not advise me or its other flight attendants that it would adjust the service dates of those who accepted this company offered leave.

2. In 1993 Continental asked its flight attendants for volunteers to take 3 to 6 months of company offered leave. At that time I took 5 months of company offered leave. The collective bargaining agreement in effect when I took the

company offered leave in 1993 did not indicate that a flight attendant accepting a company offered leave would have his or her seniority adjusted as a result of taking company offered leave. Language indicating that a flight attendant will have his or her seniority date adjusted for accepting company offered leave does not appear in any collective bargaining agreement until 1996.

3. In 1994 I took 2 months of company offered leave and in 1995, 1 took my last company offered leave of absence which lasted for 5 months.

4. Under the terms of the collective bargaining agreement then in effect, I should have received an additional week of vacation in July 1997 on the tenth anniversary of my employment with Continental. When I did not receive this additional week of vacation, I inquired and was told by Continental personnel that I would obtain the ten year vacation seniority date the following year. However, when I inquired about the extra week of vacation in 1998, I was told that my vacation seniority date had been adversely adjusted again, even though I had not taken any leave since 1995.

5. In 1999 I moved to Issaquah, Washington. Continental sent documentation to me at my new place of residence indicating that my service seniority date was my original July 1, 1987 hire date. Based on my initial hire date, I had been issued a travel card that listed my initial hire date as my jump seat and pass riding seniority date.

6. In the fall of 2000, I contacted Continental's Human Resources Department to inquire about my non-competitive seniority dates. On October 30, 2000 I was advised by Mary Ellen Holmes that I had been adversely

adjusted some 566 days for the company offered leaves I had taken during the years 1991 to 1995.

7. Holmes advised me that a company offered leave was considered to be a personal leave under Continental's policies and that seniority was therefore adjusted accordingly. However, the policies referenced by Holmes to justify the seniority adjustments did not mention company offered leave, but only referenced "personal leaves." Under Continental's corporate policy and any applicable collective bargaining agreement, company offered leaves and personal leaves are not treated the same.

8. Although I was not afforded my additional week of vacation on my tenth anniversary of employment as a Continental flight attendant, I was paid in my ninth year of employment according to the pay rate for nine years of service as indicated in the 1996 collective bargaining agreement. Therefore, it is apparent that I did not have my seniority date adjusted at all for the company offered leaves that I took between 1991 and 1995 until some time after 1996 and shortly before I was to have received an extra week of vacation.

9. In the late 1990's, Continental began to selectively retroactively adjust the non-competitive seniority dates of flight attendants who were nearing an anniversary date that would place them in a bracket entitling them to additional benefits. Continental's selective application of the seniority adjustment practices followed by its Human Resources Department was designed to prevent Continental's flight attendants from obtaining those additional benefits that would be due them under the collective bargaining agreement.

10. On August 15, 2000, I filed Grievance No. 06082 complaining of unfair and unequal adjustment of seniority. On June 27, 2001, I filed Grievance No. 06540 seeking to have the names of those persons who had obtained corporate positions at the level of Director or above removed from Flight Attendant System Seniority List. These grievances were denied at the step one and step two levels.

11. The grievances I filed were consolidated with the grievances of Marilyn Mitchell and four other individuals and scheduled for Arbitration before the System Board of Adjustment in Washington, D. C. on April 10, 2001. Robert O. Harris was selected as the "Neutral Chairman" of the Arbitration panel. Because Mr. Harris had a scheduling conflict, the date of the Arbitration was postponed and did not take place until the following year on February 5-6, 2002.

12. Prior to the initially scheduled hearing date, Marilyn Mitchell and I met in Washington with Robert Clayman, the attorney representing the IAM who was to present our grievances before the panel. Mr. Clayman made it clear that he viewed his duty as one in which he would have to decide what was best for everyone in the union as opposed to what might be in the best interest of Ms. Mitchell and me. Ms. Mitchell asked him if she would be permitted to have her own attoreny appear on her behalf at the Arbitration. Mr. Clayman's response was that the IAM would set aside Mitchell's grievance and proceed without her if she attempted to bring in outside counsel. However, after that meeting, Ms. Mitchell received a letter from William O'Driscoll, the President-Directing General Chairperson of IAM District Lodge 142, advising her that, while the union would be handling the Arbitration, if she

would sign a waiver, she could have an attorney present at the Arbitration to present additional evidence.

13. After receiving Mr. O'Driscoll's letter, Ms. Mitchell and I met with Tom Kane, an attorney whom we retained to represent us regarding the Arbitration. Mr. Kane attempted to meet with counsel for the IAM to coordinate the presentation of evidence at the Arbitration. Kane's efforts were rebuffed and he was sent a letter by the IAM's attorney, Mr. Clayman, stating that the IAM "will not concede to these individual's its exclusive right to determine how to enforce a collective bargaining agreement or how to process contractual grievances." The result was that none of the individuals whose grievances formed the basis of the Arbitration were represented by anyone other than the IAM.

14. I was given very little notice that the Arbitration would take place on February 5 and 6, 2002. I had scheduled and paid for a vacation to be taken at the time of the Arbitration but I made arrangements to appear and testify by telephone.

15. During my testimony, I was stunned when, without warning to me, counsel for IAM told the Board that I had filed grievances which the IAM did not support, and that I would be presenting those grievances on my own behalf. I was not prepared either by training or by having been given any notification that it would be my responsibility to present my grievances on my own.

16. Although it was apparent that I was surprised by the actions of counsel for IAM when I was without warning placed in an adversarial position with the IAM whom I believed would be representing me, neither the Chairman nor the members of the Board took any action to prevent

my being deprived of due process in the Arbitration hearing.

17. In rendering the Decision of the Chairman and Award of the Board, the Chairman and Board denied Ms. Mitchell and me the relief we sought. The relief fashioned was outside the terms of the collective bargaining agreement and only served to continue the unfair and improper placement of people on the seniority lists.

I declare under penalty of perjury that the foregoing is true and correct. May 13th, 2005.

/s/ Kevin L. Bale
Kevin Bale

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARILYN MITCHELL, KEVIN BALE, AND SUSAN BOORSTEIN,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 4:04-CV-03470**
CONTINENTAL AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	§	**JURY TRIAL DEMANDED**
Defendants.	§	

DECLARATION OF SUSAN BOORSTEIN

Pursuant to 28 U.S.C. § 1746, Plaintiff Susan Boorstein makes the following declaration:

1. My name is Susan Boorstein. I am one of the Plaintiffs in the above referenced case.

2. The information contained in this declaration is true and correct and is based upon my personal knowledge of the matters contained herein.

3. I have been employed as a flight attendant with Continental Airlines, Inc. ("Continental") since November 11, 1968.

4. During the years of my employment as a flight attendant, I have taken several company offered leaves of absence. Until 1996, I did not know nor was I advised by

Continental in any way that taking company offered leave would affect my seniority dates.

5. I learned for the first time that Continental was adversely and retroactively adjusting my seniority date in 1996, when Marilyn Mitchell and I attempted to board a plane. At that time, I questioned why less senior flight attendants were boarding the plane ahead of us. I was then informed for the first time that my seniority date had been adjusted to a date in 1971.

6. Subsequently, I learned that my company service date had been adversely adjusted. I became aware of this adjustment when I received a cake on the occasion of my having been employed with Continental for 30 years and was given a cake that was the type Continental gave to flight attendants who had 20 years of service.

7. It became clear to me that Continental was selectively and improperly adjusting the seniority dates of flight attendants who were entitled by their seniority to obtain additional vacation benefits, service recognition, or getting close to retirement in order to deprive us from obtaining benefits for which we had worked over a long period of time.

8. It was also clear to me that anyone who questioned the adverse adjustment of his or her seniority date would be retaliated against by further reduction of that date. It was well known and discussed extensively among the flight attendants that anyone who inquired or protested their seniority dates would have his or her date further adjusted.

9. In addition to the fact that Continental retaliated against flight attendants who questioned their seniority

dates, Continental also did not award seniority in a fair and equitable manner. For example, everyone employed by Continental other than flight attendants has his or her date of hire as his or her seniority date. Among the flight attendants, however, some receive their actual date of hire as their seniority date, others are given the date they graduate from training as their seniority date, and others are given the date they first fly as their seniority date.

10. I was not a party to the Arbitration regarding seniority grievances that took place in Washington, D.C. on February 5-6, 2002. I was not given notice that I could appear at that Arbitration, or give testimony, seek relief, or otherwise participate in the Arbitration. I did not know that my seniority rights were being addressed by that Arbitration until I received notice from Continental and the IAM that I had 30 days to show that my seniority dates had been retroactively adjusted during the time frame 2 years prior to May 17, 2002.

11. The notice that I received from Continental is attached to this declaration as Exhibit A and the notice I received from the IAM is attached to this declaration as Exhibit B. As can be seen from these attachments, I and the other flight attendants were advised that anyone who made a claim under the terms of the Arbitration award was subject to having Continental review his or her seniority date and make possibly adverse adjustments in seniority for leaves or absences taken within the prior two years. The notices also indicated that a flight attendant would have the responsibility to prove, without adequate access to the information necessary, that her non-competitive seniority had been retroactively adjusted during the two year period prior to May 17, 2002.

12. I was aware from my prior experiences that obtaining documents from the Continental HR Department at Continental is extremely difficult. I was also very much aware that flight attendants who had attempted to obtain their records or otherwise inquired about their seniority dates were subjected to arbitrary adjustment of their dates. I was therefore afraid to file a claim seeking to have my seniority restored because, based upon my prior experience, I feared that Continental would use the opportunity to once again unjustifiably adversely adjust my seniority date. It appeared to me that the only thing that would happen should I seek to file a protest as provided for in the Decision and Award, was that I would again be penalized for attempting to enforce my rights.

I declare under penalty of perjury that the foregoing is true and correct. May 12, 2005

/s/ Susan Boorstein
Susan Boorstein

[LOGO] **Continental Airlines** [LOGO]

Date: May 20, 2002

To: Flight Attendants

Subject: Seniority Arbitration Award

Arbitrator Robert O. Harris has issued his decision in the matter of several seniority grievances. His decision has required a joint obligation of the parties to inform the flight attendants of the award.

In pertinent part, the decision sets forth a rule under which certain adjustments in pay, vacation and pass boarding seniority that occurred within the past two years (that is, after May 17, 2000), but which were based on leaves and other periods of inactivity taken and completed more than one year before the adjustment, can be rescinded. This notice shall serve as the process for submitting challenges to such seniority adjustments.

The System Board, Company and Union have settled on the following process:

1. A flight attendant who had his/her seniority adjusted within the past two years (after May 17, 2000) for a leave or other period of inactivity occurring more than one year prior to the adjustment being made must submit information supporting that claim to the Union no later than June 17, 2002. Flight attendants currently on leave of absence will have 30 days after their return to duty to file protests.

2. The flight attendant should provide the following information: the date the adjustment was made, the seniority date that was adjusted (pay, vacation, or pass boarding), and the new seniority date given; documentation that you have proving

the adjustment was made, and any correspondence with the Company regarding the adjustment.

3. The Union will review the information submitted and determine whether or not the claim falls within the scope of the rule announced in the arbitration decision. If so, the claim will be submitted to the Company as a grievance no later than July 17, 2002. If not, then the claim will be dismissed.

4. The Company will review grievances submitted by the Union and decide whether to rescind the challenged adjustments. Grievance unresolved after review by the Company will be submitted to the System Board of Adjustment, which has retained jurisdiction to resolve such disputes.

The seniority adjustments at issue in the arbitration were typically done as a result of flight attendants requesting a review and/or adjustment of their seniority. In many cases. this review led to adjustments which were adverse to the flight attendant. You should be advised that the arbitration decision also authorizes the Company to review the seniority of flight attendants who file protests and make possibly adverse adjustments in seniority for leaves or absences taken within the two-year period that have not been adjusted for already.

Please note that all claims must be filed no later that, June 17, 2002. Any request, claim or grievance filed after that date will be considered untimely and will not he processed. Copies of the decision are posted in the bulletin books for review or is available from your Union representative.

[LOGO]

Date: May 20, 2002

To: All Continental Flight Attendants

From: District 142

Subject: Notification of Award in Seniority Dispute

Recently, several grievances regarding seniority issues were heard before the System Board of Adjustment with Arbitrator Robert O. Harris presiding as Chairman. The Union was successful with the grievances that involved the retroactive docking of seniority. Four of the six grievants were awarded all or part of their claims and adjustments to their seniority will be reversed. In addition, we were successful in achieving an award that also offers remedy to *any* flight attendant that has had their seniority retroactively adjusted in the past two years. It should be noted that none of the adjustments made by the Company were deemed incorrect, and no flight attendants lost seniority to which they were entitled. The award acknowledged the fact that the adjustments were made retroactive to events occurring years earlier. The award states:

"Accordingly, for retroactive adjustments that occurred within the last two years, flight attendants may protest such adjustments in their seniority dates which occurred more than a year after the event which triggered the adjustment. They may do so within 30 days of the date on which this award is rendered, and the parties shall have the joint obligation of informing all flight attendants of this decision. Flight attendants who are on leaves of absence shall have 30 days after they return to duty to file such protests. In the event a flight attendant files such a protest, the company may look at any

event which concluded during the two-year period and make adjustments to include any non-duty time which ended during that two-year period."

You would be able to receive remedy under this award if in the last two years, the Company made adjustments to your vacation, pay, or pass boarding seniority for a leave or period of inactivity that occurred more than one year prior to the adjustment. In most cases this retroactive adjustment occurred after an inquiry about your seniority was made.

Example:

One of the grievants inquired in December of 1998 about her vacation seniority. The Company informed her that they discovered they had not adjusted her enough and subsequently she was adjusted for leaves taken as early as 1971. If a similar event occurred to you in the last two years, you could be entitled to remedy.

The award does not require an examination all the employment records of Continental to determine if you are due remedy. You must bring any retroactive adjustments to the attention of the Union. You should have documentation of the adjustment and any evidence that supports that the adjustment was done at least one year after the fact. The adjustment must have been made in the last two years. Conversely, the Company is also entitled to correct any adjustment it failed to make during this same two-year period. The deadline for submitting protests is June 17, 2002 unless you are on a leave of absence, in which case you would have 30 days from your return to submit a protest.

At the direction of the System Board, the Company and the Union have prepared an explanation for how the process will apply which has been distributed in all v-files.

Finally, in the future, the award provides that the Company may not make adjustments to your seniority more than one year after the occurrence of a leave or period of inactivity. Likewise, if you do not advise the company of an incorrect adjustment of your seniority within one year of the adjustment, the adjustment will be final. It will be your responsibility to monitor your pay seniority via your pay sheets, your vacation seniority on an annual basis via the vacation adjustment notification provided in October of each year, and your pass boarding seniority via the computer (no adjustments should be made following the June 24, 1996 contract).

Grievances involving Director level and above personnel on the seniority lists, persons who were placed on the seniority list with a date that did not coincide with the date they were placed on the flight attendant payroll and an individual alleged to be working outside the scope of inflight were denied as untimely. Both the 1996 and 2000 contracts state: "Seniority dates and accruals in effect on the date of the signing of this Agreement will remain, and will not be retroactively affected as a result of any rule changes in this Agreement". In addition, the Letter of Agreement #22 provides "management employees below the officer level currently on the flight attendant seniority list should remain on the list". Protests in these areas must be made within 30 days from the twice yearly publication of the System Seniority List.

Grievances involving adjustments for former Continental flight attendants for events that occurred prior to

1983 (under the "Black Book") were covered by a 1989 settlement between the Company and the Union and should have been brought to the attention of the Company at that time.

Grievances arguing that flight attendant bidding seniority should be used for jumpseat authority rather than company seniority were not pursued. This policy has been in effect for many years. It has always been published in the inflight manual and negotiations have failed to change the policy. Furthermore, such a change would currently be at the detriment of some flight attendants. Any changes to this policy would have to be addressed in negotiations where ratification by the membership would prevail.

Copies of the decision will be available in the inflight offices. If you have any questions, contact your local base representatives.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARILYN MITCHELL, KEVIN BALE, AND SUSAN BOORSTEIN,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 4:04-CV-03470**
CONTINENTAL AIRLINES, INC. AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,	§	**JURY TRIAL DEMANDED**
Defendants.	§	

DECLARATION OF ANDREA ESTELLE

Pursuant to 28 U.S.C. § 1746, Andrea Estelle makes the following declaration:

1. My name is Andrea Estelle. I reside in Houston, Texas and am employed by Continental Airlines, Inc. ("Continental").

2. The information contained in this declaration is true and correct and is based upon my personal knowledge of the matters contained herein.

3. I have been employed as a flight attendant with Continental since June 24, 1968.

4. During the years of my employment as a flight attendant, I have participated in three separate legally sanctioned Strike actions, suffered Occupational Injuries,

taken Family Leaves, and a few Company Offered Leaves. I subsequently learned that many years after I took these leaves of absence Continental retroactively adversely adjusted my seniority dates without my knowledge. I learned that in approximately 1999, my seniority date had been adjusted for Strikes, Occupational Injury leaves, Family Leaves, and other approved Company Offered Leaves taken as early as 1983, and also the 59 day Adoptive Leave that I took when I adopted my daughter in 1974. I found out all of this from paperwork that I received from Hewitt, the agency responsible for the Continental pension plan.

5. I was not a party to the Arbitration that took place in Washington, D.C. February 5-6, 2002. However, I did attend both days of the Arbitration. I was present to assist Kevin Bale in presenting his documentary evidence. He was not able to be at the Arbitration in person because he was not given sufficient notice of the hearing date and had already scheduled and paid for a vacation. He did testify on the first day of the hearing by telephone. He had prepared a large notebook of materials demonstrating the selective application of the seniority date adjustments regarding himself and other flight attendants. He also had filed a grievance and gathered materials indicating that management level employees of Continental had been gifted with seniority and appeared on the flight attendants' seniority list in violation of the collective bargaining agreement. In order to facilitate his testimony by telephone, Mr. Bale had copied his entire book of materials and numbered the pages in such a way that he could refer to a page and have the panel in Washington review the same materials. I was present at the Arbitration because I had taken this book to Washington for him.

6. Mr. Bale was not given the opportunity to adequately present his materials. When Mr. Bale was called as a witness, Robert Clayman, the attorney for IAM, asked him only a few questions and did not refer to the vast majority of the materials that were available to prove Mr. Bale's claims. Then, without any warning, Mr. Clayman told the members of the System Board of Adjustment that Mr. Bale had filed a grievance that the IAM did not support or condone and that Mr. Bale would present that grievance on his own.

7. It was quite obvious that Mr. Bale was taken by surprise and had not been told that he would be presenting his grievance on his own. It was also apparent that when the union attorney presented the testimony as not being sanctioned by the union, the grievance had no chance of being sustained.

8. On the second day of the Arbitration hearing at the very end of the day, Marilyn Mitchell was called as a witness. She was as I recall the last witness to testify. Before she testified, a 10 minute recess was taken. Before the hearing resumed, Ms. Mitchell, who had just spoken with Mr. Clayman, spoke to me and in a very distressed manner said, "I'm now responsible for my whole case." The hearing resumed almost immediately. Ms. Mitchell was obviously distraught. Her voice was shaking. She had tears in her eyes. She was visibly shaking and was obviously very angry. She explained to the members of the System Board of Adjustment that she had just learned that she was going to have to present her case herself rather than have the IAM's attorney present her case as he had for the other witnesses and for those whose grievances like Ms. Mitchell's were being heard.

9. Ms. Mitchell was obviously unprepared to represent herself and the injustice of the situation was apparent to anyone who was present. Ms. Mitchell had neither the training nor the skills to present her case and she was not given any advanced warning that she would be placed in such an untenable situation.

10. To make matters even worse, the attorney for Continental was permitted by the Chairman of the System Board of Adjustment to cross-examine Ms. Mitchell and she was left without an attorney to raise any objections to the questions. At one point, I realized that Continental's attorney had shown her a document which he represented was part of the collective bargaining agreement of a certain year, but that it was not in fact the agreement for the year of the document he indicated. Because it made a great amount of difference to the outcome if a certain provision was applicable in that year, I finally said to one of the union officials present, "Is no one going to do anything?" At that point the union official said something to Mr. Clayman who pointed out that the Company Lawyer was indicating an incorrect Contract for the document.

11. I remember witnessing this gross miscarriage of justice and thinking to myself that, at least the proceedings are being recorded so that someone can review what went on here and do something about it. Mr. Harris, the Chairman of the System Board of Adjustment was very intent on making sure that all the testimony was recorded. He also accepted documents from both sides. At no time during the proceedings did Mr. Harris or anyone else state that the recordings and the documentary evidence would be destroyed when he rendered his decision. I was truly shocked when I was told that the record in this matter had apparently been destroyed.

12. I witnessed two other actions during the Arbitration that I found surprising and demonstrated to me that the hearing was not unbiased. Wendi Femia, Continental's Director of In-Flight Services was present at the hearing. When Mr. Harris saw her, he went out of his way to go over to her and to hug and kiss Ms. Femia. The two of them obviously knew each other well and Mr. Harris was extremely happy to see Ms. Femia. At one point in the proceedings, Mr. Harris practically knocked some people over to make sure that Ms. Femia had some of the candy that was put on the tables at the hearing. The second action involved a statement that Mr. Harris made to Mr. Wall, Continental's attorney. During a break, I remained in the Arbitration room while everyone else except Mr. Harris and Mr. Wall had left. Mr. Harris said to Mr. Wall words to the effect of "This must be a big deal because the union doesn't bring in Robert Clayman unless it's a big deal." The statement and the manner in which it was made led me to believe that the decision-making would be influenced by such irrelevant considerations rather than upon the correct interpretation of the collective bargaining agreement.

13. Although I was not a party to the Arbitration, I did receive a notice that I could file a protest regarding my seniority under the terms of the Adjustment Board's decision. My claim, however, was denied. I was unable to demonstrate that my seniority had been adversely adjusted during the restrictive two year period required by the Board's Decision and Award. By instituting this arbitrary two year limitation, the decision in actuality contributed to the lack of integrity of the seniority system at Continental rather than remedying the injustice that has corrupted the system. The Decision and Award also

served to lock the Continental flight attendants into positions on the seniority list that have nothing to do with their actual seniority and into positions that favor some flight attendants over others without justification.

I declare under penalty of perjury that the foregoing is true and correct.

May 13, 2005

/s/ Andrea Estelle
Andrea Estelle